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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORIGINAL No. 2

In Equity.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

COMMONWEALTH OF VIRGINIA,
Plaintiff,

vs.

STATE OF WEST VIRGINIA,
Defendant.

DEFENDANT'S BRIEF.

PART III.

General Brief on Law and Merits of Case.

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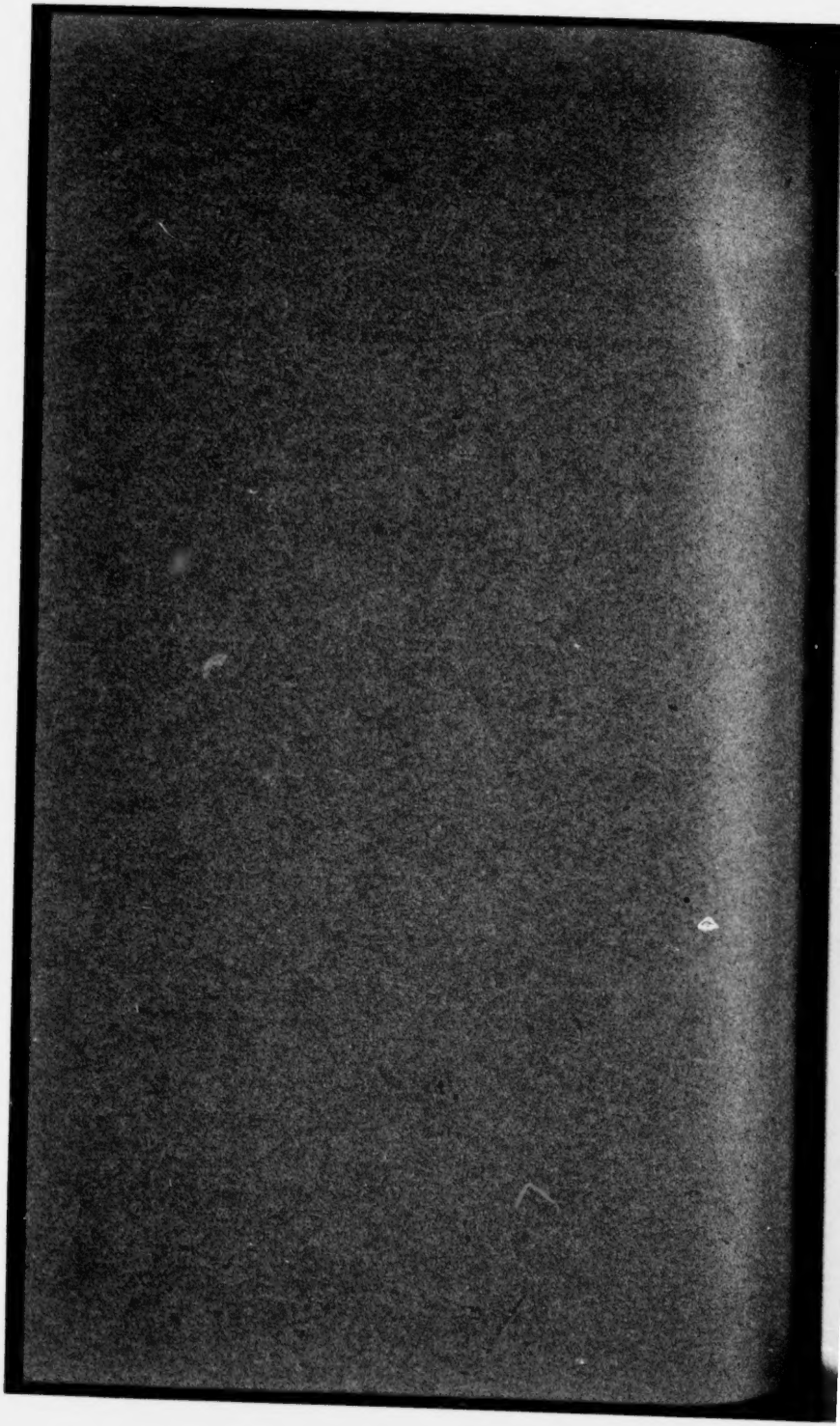

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In the Supreme Court of the United States,

OCTOBER TERM, 1910.

COMMONWEALTH OF VIRGINIA AGAINST STATE OF WEST VIRGINIA.	Original No. 3. Defendant's Brief, Part III.

PART FIRST.

Causes of Separation of West Virginia.

INTRODUCTION.

Part I of defendant's brief deals with questions of law which do not go to the merits of the case, and Part II. deals with the exceptions of the complainant and defendant and the report of the Master. This brief is intended to deal with the principles of law applicable to the facts admitted by the pleadings, developed before the master, and matters of common history and knowledge of which the court takes judicial notice. Such an argument must inevitably involve some repetition in respect of questions covered by Part II.; but this is avoided as far as possible.

1. RULE OF CONSTRUCTION TO BE APPLIED IN THIS CASE.

This court said in *Scott vs. United States* (12 Wallace, 443), which involves the construction of a contract between the Government and an individual and the ascertainment of the intent of the parties:

> "In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made—to let in the light of surround-

> ing circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning."

This settled doctrine, so admirably stated by the court, is peculiarly applicable to this case, both in the construction of the Wheeling Ordinance of August 20, 1861, and of Section 8 of Article VIII. of the Constitution of West Virginia, which was adopted by the Convention that assembled pursuant to the provisions of the Ordinance and under which West Virginia, with the consent of Virginia, was admitted into the Union as a State. The true construction of these instruments and a just determination of the case, cannot be reached without reference to the relations of Northwestern Virginia and her people and Eastern Virginia and her people, territorially and sentimentally, and to the circumstances under which the movement for the formation of the new State was inaugurated and carried to consummation.

2. Physical Characteristics of Eastern Virginia and Northwestern Virginia.

Some elements in the problem are not susceptible of proof by the testimony of living witnesses, but are susceptible of accurate ascertainment from the history of that period. This Court will take judicial notice of the physical fact that Northwestern and Western Virginia within the boundaries described by the Ordinance and the Constitution is remote from tidewater, and separated from Eastern Virginia by the Alleghany Mountains ; that this region which became the State of West Virginia lies mainly on the western slope of the Appalachian Mountains and is bounded on the north by Ohio, Pennsylvania and Maryland, on the east by Pennsylvania, Maryland and Virginia, on the south by Virginia and Kentucky, and on the west by Kentucky and Ohio.

> " The Alleghany watershed is in the Eastern portion of the State, all except eight of the counties lying on

the Western slope within the Ohio Basin. In the higher part of the State, where Pendleton, Pocahontas and Randolph Counties join, five rivers rise which flow across the State--two finally flowing eastward into the Atlantic and three westward into the Ohio. The Ohio forms the western boundary and is navigable throughout its length. The eastern part of the State is drained by the Potomac and its tributaries. The Cheat and Monongahela flow through the northern counties and the latter is now navigable as high up as Fairmont, in Marion County. The Greenbrier and the Elk form the watershed to the southwest and join the Great Kanawha, which flows northwest into the Ohio. The Great Kanawha is navigable for 90 miles from the Ohio. The Big Sandy, flowing northwest, forms the southern boundary of the State. The river system of the State has been improved somewhat for navigation by government engineers, but the interior rivers will always be more valuable for their water power than for facilities of navigation" (See "West Virginia", the "Americana," published by "Scientific American").

3. Court May Resort to Speeches of Chairman of Committee Reporting a Bill and of Author of the Bill.

We are fully mindful of the rule that in construing an Act of Congress the court does not consider itself at liberty to recur to the views of individual members of either body in debate; or to consider the motives which influenced them for or against the passage of the measure. The rule has not always been observed here, and, moreover, is not without exceptions.

What is said by the Chairman of a Committee of either body in reporting a measure as to its purpose and meaning, has been resorted to by the Court in aid of its construction. The same is true in respect of the observations of the author of a measure in exposition of its provisions. And here we, therefore, feel at liberty to quote from the remarks of Senator Wade, Chairman of the Committee on Territories of the Senate, who reported the Bill for the admission of West Virginia

into the Union (Congressional Globe, Part 4, 37th Congress, 2d Section, p. 3038).

4. Speech of Senator Wade in Support of Act for Admission of West Virginia.

Senator Wade said :

"I have looked at the condition of things in Western Virginia, and I have come to the conclusion that it is impossible for the people of Eastern and Western Virginia to live together in harmony and peace. It is not a new controversy among these people. When I came to investigate it, I find that it has existed for a long period of years, much of it probably growing out of the entire isolation of the two sections, for there is really no communication between the east and west. As Governor Pierpont remarked to me, 'We have no communication whatever, except it be furnishing a few members of the Legislature, and a few inmates of their penitentiary.' In other respects, in commercial feeling, in political feeling, in association, they are entirely isolated. On this subject of slavery they feel entirely different. There is an animosity between them that is more intense, I believe, from what I gather from the best men of that section, than that which exists between any of the northern and southern States. Under these circumstances the question is, shall they be compelled to be joined with the other portions of the State where they will undoubtedly be put under the ban of a hostile legislation for years? They complain that they have been heretofore. It is a standing complaint with them that while taxes and burdens have been imposed upon them by the vast majorities of the eastern section, for internal improvements and the like, they have been awarded no benefit from them whatever, and this has aggravated the difference between them."

5. Speech of Senator Willey.

Senator Willey, elected to the "Restored" Legislature of Virginia, and the author of the Bill to admit West Virginia as

a State (Cong. Globe, Part 4, 37th Cong., 2nd Session, p. 3038), said:

"Sir, it is with pain that I am compelled to take this stand, but I am justified in doing it. These people have looked for sixty long years to this day. Time and again have the sections of Virginia been upon the eve of an outbreak, of an insurrection. Criminations and recriminations have sounded in our legislative halls at every session of the Legislature for the last thirty or forty years. Threats of violence have been hurled by one section at the other. And to-day, when the loyal people come with a united voice, having fulfilled all the requisitions of the Constitution and all the forms of the law, and I stand here, where my colleague does not stand, representing the voice of the people of Virginia, who ask for freedom, who ask for severance from the eastern section of the State to whom we have been in bondage in a great degree for fifty or sixty years, he gets up here on the very eve, as I have reason to believe, of the passage of the bill, when the Senate of the United States is about to bestow upon us the long prayed for boon, and he interposes an objection, to postpone and defer our long-cherished hopes and desires.

"Now, sir, I wish to make another remark in answer to the Senator from Illinois. He seems to have fallen into the mistake, common to almost every person, that this movement was conceived in a desire to separate ourselves from the disloyal portion of the State of Virginia, that it grew out of our national difficulties, out of the secession of Virginia from the Federal compact. No, sir; no. These circumstances may have precipitated action upon it; they may have give us the opportunity to effect the long-cherished desire of our section of the State; but this controversy is older than I am; I have heard it ever since I can remember anything. It grows not out of these national dissensions; it grows not out of loyalty or disloyalty to the Government; it grows not out of this question of secession; but it grows out of the social, geographical, com-

mercial, industrial distinction and antagonisms that never can be reconciled by the power of man. The Almighty, with His own eternal hand, has marked the boundary between us. We live upon waters that flow in the valley of the Mississippi; our eastern brethren live upon waters that flow into the Potomac and the Chesapeake; and there is a chain of impassable mountain barriers between us that prevent, and will forever prevent, all connection, all social relations, all interchange of traffic and commodities by any convenient means of transportation. Owing to these facts, we ask this separation, and we place it upon these large national grounds; not upon the question of secession and disloyalty. If those were the only questions at issue, I would say to the western people, as I have hitherto said to them, stand fast, not only until the Union is restored, but until all Virginia again is made loyal to the national flag, and until we all dwell together again beneath its ample folds in peace and in security. But, sir, we never can dwell in harmony, not because now we are separated by principles of secession and anti-secession or loyalty and disloyalty, but because the Almighty, with His own hand, has placed barriers between us that separate our trade and our intercourse, because our social relations are different, because our places of market are different, because our industrial interests are different, and because, on account of these facts, our internal resources have never been developed, and never can be developed while we are connected with Eastern Virginia."

Again he said:

"It is said, 'Whom God hath joined together, let no man put asunder.' The reverse is true, whom God hath put asunder, let no man attempt to put together. There is no identity of interests, there is no homogeneity between the people of the valley and the people west of the Alleghany Mountains. And we are to-day fulfilling that remarkable prediction of Mr. Webster, that whenever there was an attempt to withdraw Virginia from

the Union, it would be seen that the inhabitants living upon the waters of that State which flow into the Valley of the Mississippi would inevitably go with the people of that valley."

This was said in opposing the amendment reported to the committee which added 140,000 people and several counties to the proposed State. He further said in support of the amendment to strike out the additional counties which had been added by the committee (p. 3037):

> "By so doing you secure a new State, that will be perfectly homogeneous and identical in interests with the great States of Ohio and Pennsylvania; the great breakwater which the selfish policy of the eastern government of Virginia has always interposed between those connections across West Virginia will be swept away, and the people of Ohio, Pennsylvania, and West Virginia will be one people in interest, living together harmoniously; and the great resources of that section of the State will no doubt be speedily developed; while all this can be done without detracting one iota from the interest, the welfare, the rights, or the privileges of the eastern section of the State."

6. Speech of Daniel Webster.

The historical fact must be remembered also, that the people of West Virginia were not in sympathy with the institution of slavery and were opposed to secession. Mr. Webster recognized the natural and abiding commercial isolation of western Virginia from eastern Virginia, and in a speech which he made, to which Senator Willey refers, at the laying of the corner stone of the addition to the capitol here in 1851, he warned the people of Virginia against the issue of disunion raised by Mr. Calhoun. After appealing to the people of Virginia, and especially to the men of "James River and the Bay" and to the men "beyond the Blue Ridge," he said:

> "And ye men of western Virginia, who occupy the great slope from the top of the Alleghanys to Ohio and

Kentucky, what benefit do you propose to yourselves by disunion? If you 'secede,' what do you 'secede' from, and what do you 'accede' to? Do you look for the current of the Ohio to change and to bring you and your commerce to the tidewaters of eastern rivers? What man in his senses can suppose that you would remain a part and parcel of Virginia a month after Virginia should have ceased to be a part and parcel of the United States?"

7. Conditions at the Time of Creation of West Virginia.

When the great transactions occurred which are under review, the Confederate States of America had been formed. The Ordinances of Secession had been passed by South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana. Virginia had passed an ordinance of secession, had borrowed $1,000,000, had called for 10,000 men to serve for twelve months and had arranged with the Confederate government for admission to the Confederacy, and in the meantime that her troops should, under that Government, be employed against the United States. Her troops had seized the Norfolk and Gossport Navy Yards, the arsenal at Harper's Ferry. the Customs Houses, and other property of the United States within her borders; had hauled down the flag of the United States and hoisted in its place another. President Buchanan in a message to Congress had taken the position that there was no power in the Federal Government under the constitution to coerce a state. Fort Sumter had been surrendered.

President Lincoln had called for 75,000 troops to serve three months. The battle of Bull Run had been fought in which the Federal troops were disastrously defeated. The "New York Tribune," edited by Mr. Greeley, exercising a most potent influence upon public opinion, advocated a peaceful separation of the States determined to withdraw, and many eminent men of undoubted love for the Union in both parties seemed to be of the same opinion. There was grave doubt throughout the country as to the ultimate result. *The people of West Virginia could not be blind to the fact that if the Con-*

federacy should be established, that territory would, unless action were taken, be irrevocably a part of that Confederacy.

Isolated from eastern Virginia, and differing in sentiment from her people in respect to the right of secession and the institution of slavery, her people are not to be justly chided here or elsewhere for embracing that opportunity to become a State in the Union. In this situation, is to be found the genesis of West Virginia; and in the light of this situation, her people are to be judged and her compacts and "constating" instruments are to be construed.

PART SECOND.

The Rule of Public Law in Regard to the Apportionment of the Debt of a State After Its Division.

1. This Court Has Never Decided That When a State Is Divided the Debts of the Original State Should Be Ratably Apportioned Between It and the New State.

It has been assumed, and is now assumed by counsel for the complainant, that this court has so decided. They cite in support of their contention the opinion of the court delivered by Mr. Justice Field in *Hartman vs. Greehow*, 102 U. S., 672, and *Antoni vs. Greenhow*, 107 U. S., 769. It may be said here that the opinion of Mr. Justice Field in the latter case was a dissenting one. The question was not in any wise involved in either case. The Hartman case was as follows:

By act of March 30th, 1871, known as the "Funding Act" by which Virginia made an adjustment with her creditors under which she funded two-thirds of her debt and issued bonds for the same, it was provided that the coupons should be made payable to order or bearer, and it was declared that the coupons should be payable semi-annually, to be "receivable at and after maturity for all taxes, debts, dues, and demands due the State," and that this should be so expressed on their face. Hartman, a resident of Richmond, and a citizen of Virginia, on the 5th of April, 1878, was indebted to the State for taxes to the amount of $26.53. On that day he tendered to the treasurer of Richmond, who was by law charged with the duty of collecting the taxes of the State in that city, certain interest coupons, which were overdue, amounting to $24, cut from bonds of the State (which bonds he did not own), issued under the act of 1871, and $2.53 in lawful money of the United States in payment of the taxes. The treasurer refused to accept the coupons in payment of the taxes without first deducting therefrom the taxes imposed by Virginia on the bonds to which they were originally attached, and of which the holder

of the coupons was not the owner. Upon this refusal, he applied to the Supreme Court of Appeals of Virginia for a writ of mandamus to the treasurer to compel him to receive the coupons, with the money mentioned, in full discharge of his taxes, without any deduction from the coupons for the taxes upon the bonds. The Court of Appeals of Virginia issued a rule or an alternative writ upon the Treasurer, he answering that the General Assembly for many years had exercised the right to tax all bonds, choses in action, and other evidences of debt, including bonds of the State; that the taxes assessed upon the latter bonds were according to their market value, the amount being fixed at 50 cents on the $100 of such value; that the law required the taxes to be collected when the interest on the bonds was paid, and made it a high penal offense for any officer to receive coupons in payment of taxes without deducting from their face value the tax levy upon the bonds from which they were taken, etc.

The judges of the Supreme Court of Appeals of Virginia were equally divided upon the question. This operated as a denial and the petition was denied. The court, however, certified that on the hearing of the case there was drawn in question the validity of the statute of the State authorizing the tax upon the bonds and requiring its deduction from the coupons, on the ground of its repugnancy to the provision of the constitution of the United States, prohibiting any legislation by the states impairing the obligation of contracts; and that the decision was in favor of the validity of the State statute and against the right claimed by the petitioner under the provision of the Constitution of the United States.

Thereupon the case was brought to this court and manifestly it involved only the question of the right of plaintiff in error, Hartman, to pay his taxes with the coupons and the added money. This, by the terms of the law, providing for the issue of the bonds and coupons and by the terms of the coupons themselves, he was entitled to do. The Court based its judgment sustaining the right of the plaintiff in error to pay his taxes with coupons on the authority of *Murray vs. Charleston*, 96 U. S., 432, saying:

> "This decision would be decisive here, but the present case is still stronger for the creditor. The Funding

Act made the bonds issued under it payable to order or bearer, and made the coupons payable to bearer. They were so far distinct and independent contracts that they could be separated from each other and transferred to different hands."

So it is held:

"We are clear that this act of Virginia of 1876 (sect. 117), requiring the tax on her bonds, issued under the Funding Act of March 30, 1871, to be deducted from the coupons originally attached to them when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds, and held by different owners, without impairing the contract with such bondholders, contained in the Funding Act, and the contract with the bearer of the coupons."

Mr. Justice FIELD said, however, in the opinion:

"During the war a portion of her territory was separated from her, and by its people a new State, named West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But as the whole State had created the indebtedness for which the bonds were issued, and *participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness* should be assumed by that part which was taken from her and made a new State. Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On the subject Kent says: 'If a State should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by *special agreement*, their rights are to be enjoyed and their obligations fulfilled by all the parts

in common.' 1 Com., 26. And Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: 'In that case, the obligations which have accrued to the whole before the divisions are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts. This principle is established by the concurrent opinions of text-writers, the decisions of courts, and the practice of nations.' International Law, c. 3, Sect. 27." (Italics ours.)

In *Antoni vs. Greenhow*, 107 U. S., p. 770, Mr. Justice FIELD, in his dissenting opinion, incorporated very much the same observations, referring to the authorities cited by him in *Hartman vs. Greenhow, supra.* The subject was not involved in either case. If Virginia had never been divided, under the same legislation and upon the same state of facts, the question before the Court would have been precisely the same.

We are constrained, albeit with the utmost reverence for the memory of Mr. Justice FIELD, to say that, in both opinions, his observations with respect to the liability of West Virginia, upon the rules of International Law, for a proportion of the public debt of Virginia, prior to January 1, 1861, seem entirely *obiter*.

2. THE TRUE RULE OF PUBLIC LAW IN CASE OF THE DIVISION OF A STATE. GENERAL DEBTS ARE APPORTIONED ON THE BASIS OF TAXABLE VALUE. LOCAL DEBTS ARE ASSUMED BY THE STATE FOR THE EXCLUSIVE BENEFIT OF WHOSE TERRITORY THEY WERE INCURRED. THE AUTHORITIES.

Publicists seem to be in entire accord as to some phases of debt succession between States: First, that when one State and its provinces, if it have any, are absorbed by another, either through subjugation, or through voluntary merger, the absorbing state is liable for the whole debt of the extinguished state. Second, that when a State is broken up into separate states, the original state personality having become extinct, the separate States thus formed are each bound for a proportional amount of the debt of the original State. Third,

where a State is broken up into fragments, and separate portions of it are absorbed by surrounding States, they are liable for the debts of the original State.

(a) HALL.

Mr. Hall who has been frequently quoted by this court and who certainly was a discriminating and learned writer upon the law of nations, says at page 78 :

> " When a *new state* splits off from one already existing, it necessarily steps into the enjoyment of all rights which are conferred upon it by international law in virtue of its existence as an international person, and it becomes subject to all obligations which are imposed upon it in the same way. No question, therefore, presents itself with respect to the general rights and duties of a new state. What, however, is its relation to the contract obligations of the state from which it has been separated, to property belonging to and privileges enjoyed by the latter, and to property belonging in common, before the occurrence of the separation, to subjects of the original state in virtue of their status as such, when some of them after the separation become subjects of the new state?
>
> " The fact of the personality of a state is the key to the answer. *With rights which have been acquired and obligations which have been contracted, by the old state as personal rights and obligations the new state has nothing to do. The old state is not extinct; it is still there to fulfill its contract duties, and to enjoy its contract rights.* The new state, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other states have contracted ; they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have accepted on its own account. What is true as between the new state and foreign powers, is true also as between it and the old state. From the moment of inde-

pendence all trace of the joint life is gone. Apart from special agreement no survival of it is possible, and the two states are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law. And as the old state continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost ; so that property enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continues to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, *obligations contracted with reference to it alone*, and property which is within it, and which has theretofore a local character, or which, though not within it, belongs to state institutions localized there, transfer themselves to the new state person.

" Thus treaties of alliance, of guarantee or commerce are not binding upon a new State formed by separation, and it is not liable for the *general debt* of the parent State. * * * It is saddled with local obligations such as that to regulate the channel of a river or to levy no more than certain dues along its course, and *local debts*, whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it."

On page 80 of his work on International Law is found a note upon the subject of this particular phase of law which is peculiarly instructive, for his comments upon the indefiniteness with which Grotius and other authors named have written upon it. For the convenience of the Court, it is herein incorporated :

" The subject is one upon which writers upon international law are generally unsatisfactory. They are incomplete and they tend to copy one another. Grotius, for example, says that if a state is *split up* ' Anything which may have been held in common by the *parts* separating from each other must either be administered

in common or be ratably divided.' De Juri Belli et Pacis, lib. II., c. IX.; Section 10, Kent (Comm. i. 25) does little more than paraphrase this in laying down that 'If a state should be divided in respect of territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed and those obligations fulfilled by all the parts in common.' Phillimore quotes Grotius and Kent and adds: 'If a nation be divided into *various distinct societies*, the obligations which had accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the parts; 1 sec. CXXXVII'."

Mr. Hall adds (and it is certainly justified):

"It is difficult to be sure whether these writers only contemplate the rare case of a state so *splitting up*, that the original state person is represented by no one of the factions into which it is divided, or whether they refer also to the more common case of the loss of such portion of the state territory and population by secession, that the continuity of the life of the state is not broken. If the former is their meaning, their doctrine is correct so far as property and monetary obligations are concerned; if not, it would be hard to justify their language even to this extent. No doubt the debt of a state from which another separates itself ought generally to be divided between the two proportionately to their respective resources as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by a diminution of the state indebted to them. But the obligation is a moral, not a legal one. The fact remains that the *general debt* of a state is a personal obligation. *The case also of the creation of a new state out of a part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one state to another.* (Italics ours.) When the latter occurs at least as the result of conquest, it is not usual to take over

any part of the *general debt* of the state ceding territory. The case of Belgium, which took over a portion of The Netherlands debt, is scarcely in point. The Treaty of 1839 (De Martens' Nouv. Rec. XVI, 782), by which the division of the debt was effected, was part of a general settlement of the countries in question made at the dictation of Europe with a view of dealing with all the interests concerned in the most equitable and advantageous manner and not with the bare object of enforcing law. The true rule is recognized by Halleck (i. 76), who distinguishes the case of a state which is so split up as to lose its identity from that of a state which suffers dismemberment without losing its identity. 'Such a change,' he says, 'no more affects its rights and duties than a change in its internal organization or in the person of its rulers. This doctrine applies to debts due to as well as from the state and to its rights of property and treaty obligations except so far as such obligations may have particular reference to the revolted or dismembered territory or province.'"

In the brief of the learned counsel who formerly appeared as *amicus curiae* but now appears for the bond-holding creditors of Virginia, it is said (page 20):

> "Among the writers on public law referred to by the learned justice (whose opinions concurred with the view expressed by him) there may be mentioned the following, citing Puffendorf, Phillimore, Wheaton, Moore, Wharton, Oppenheim."

(b) OPPENHEIM.

It is justly conceded that Oppenheim is a learned, accurate and discriminating publicist. He says (sec. 84):

> "When, in consequence of war or otherwise, one state cedes part of its territory to another, or when a part of the territory of a state breaks off and becomes a state and an International Person of its own, succession takes place with regard to such international

rights and duties of the predecessor as are *locally connected* with a part of the territory ceded or broken off and with regard to the fiscal property found on that part of the territory. It would only be just if the successor had to take over a corresponding part of the *debt* of its predecessor, *but no rule of international law concerning this point can be said to exist although many treaties have stipulated a devolution of a part of the debt of the predecessor upon its successor.* Thus, for instance, Articles 9, 33 and 42, of the Treaty of Berlin of 1878 stipulate that Bulgaria, Montenegro and Servia should take over a part of the Turkish debt."

He adds, in a foot-note:

"Many writers, however, maintain that there is such a rule of International Law. (See Huber, Nos. 125-135 and 205, where various treaties are enumerated.")

(The italics are ours.)

(*c*) GLENN.

In Glenn's Work on International Law (Hornbook Series), page 36, under the head "Effect of Change of Sovereignty—Upon the Public Rights and Obligations," it is said:

"Three classes of cases arise: (*a*) When a new and independent state is formed by separation from an existing state; (*b*) When a portion of the state is lost by cession; (*c*) When a state is wholly absorbed.

"In the first case, two separate and distinct international persons exist instead of one and the new state has nothing to do with the personal rights and obligations of the parent state, which still possesses its identity. So also the parent state remains in sole possession and enjoyment of its separate property and the rights connected therewith. Treaties of alliance and guarantee of commerce are not binding upon the new state, nor is it liable for *the general debt of the parent state.* The new state comes into possession of rights, including those under treaties and *obligations, connected with the property*

within it. It is entitled to the privileges of navigating rivers that its citizens possess by virtue of being citizens of the parent state and is bound by the obligations connected therewith, such as regulations in regard to the dues, etc. It becomes liable for *local debts, including those for local objects,* and those *secured by local revenues.*" (Italics ours.)

(*d*) HANNIS TAYLOR.

Mr. Hannis Taylor, who is a writer of great research, and is quoted in the brief of the learned counsel for the bond-holding creditors, in his work on International Law, Section 166, says :

"*When severed territory becomes a distinct state—local rights and obligations.*—A narrower and more technical rule prevails when the parent State is deprived of a portion of its territory *which is erected into an entirely distinct political community.* The cogent reasoning in such a case is that as a man who loses an arm or leg in battle is not thereby relieved of any part of his obligations, so a State that is so dismembered as to suffer no loss of identity remains bound as before for its entire general indebtedness. 'Such a change', Halleck says, 'no more affects its rights and duties, than a change in its internal organization, or in the person of its rulers. This doctrine applies to debts due to as well as from the State, and to its rights of property and treaty obligations, *except so far as such obligations may have particular reference to the revolted or dismembered territory or province.*'" (Italics ours.)

"In other words, as the old State continues its corporate life without interruption, it retains all general state property, and all general benefits resulting from treaties with full liability for all *general* obligations with which the new creation taken from its side may disavow all legal connection. The new State on its part carries with it *only local obligations,* whether *contracted for local objects* or secured by a lien on local revenues, and such local duties as arise out of agree-

ments to maintain the channel of a river, or to levy no more than certain tolls along its course. As a compensation for such burdens the new State is entitled to property within it of a local character, or to such, not within it, as belongs to State institutions localized there, and to the privileges arising from treaties specially contracted for the benefit of its territory," etc.

This certainly has the merit of clearness. Summarizing, he says (Section 168):

"After a careful review of all the authorities the general statement may be made (1) that no matter whether a State is entirely extinguished by a division into two or more distinct States, or (2) whether it loses its identity by being absorbed into another State, or (3) whether a State without a loss of its identity has a portion of its territory taken from it to form an integral part of another State, or (4) whether such several part is erected into an entirely new and independent State all local charges, and guaranteed debts to which certain domains and their revenues are dedicated, survive as charges upon the localities to which they relate, with their equities unimpaired. In the case first named, the *general debt* of the State should certainly be ratably binding, morally, if not legally, on its several parts; in the second it passes as a whole to the absorbing State; in the third the acquiring State should assume a ratable proportion of it; and in the fourth, every principle of equity and good conscience requires that it should be provided for out of the common state property and the residue divided in proportion to the revenues of the two distinct commonwealths. In the notable case of West Virginia that obligation, though formerly recognized, has never been discharged."

He seems to coincide, so far as the *moral* obligation is concerned, with Hall, Oppenheim and other writers; and to agree with them also that there is no rule of International Law which makes it a *legal* obligation.

(*e*) PRADIER FODÉRÉ.

Pradier Fodéré, in "Traité de Droit International Public," Vol. 1, Paris, 1885, Section 156, states :

> "The State to which cession is made is bound by *local debts* of ceded territory."

Section 157 :

> "But is the State receiving the cession bound by a part of the other obligations resulting from treaties made with the ceding State and not attached to the ceded territory, merely because it has had the benefit of the cession? in other words, are obligations and rights which are neither local nor personal, resulting from treaties made with a State, necessarily transmitted, in any proportion, to the State to which a cession is made, together with the ceded territory? *No; the ceding State remains bound or vested with the rights, for, it alone made the contract. The same rule holds, when, instead of being ceded, a province becomes an independent State.* The new State is not generally bound by *non-local obligations* of the State from which it is separated. Such at least is the principle; but it can be modified in practice by a treaty. Thus the Kingdom of Italy, after the acquisition of Lombardy and Venice, only took the place of Austria in respect of the local obligations and rights of the provinces acquired, and refused to take upon itself a proportion of the *general debt* (italics ours) of the Austrian Empire. So also no part of the French debt was imposed upon the province of Alsace-Lorraine which France was forced to cede to Germany in 1871; but—and this is an example of the exceptions which treaties can make from the general rule—the Treaty of Berlin, of 1878, imposed part of the publish Turkish debt upon Bulgaria, constituting a diminished principality or territory under the suzerainty of the Sultan, and upon Montenegro and Servia, whose independence was recognized."

(f) BLUNTSCHLI.

Bluntschli says, Section 59 :

"The debts of the State ought not to be divided proportionally to the *population*. Mortgage or landed debts will be adjudged to fall to the State which obtains the land securing the debt. Other debts will be apportioned proportionally to the *taxes* paid by the divers portions of the territory.

* * * * * *

"2. The security of other *public debts* rests on the *taxable fortune* of the members of the State, and is measured by the *actual product of the taxes* which, accordingly, furnishes a *juster basis than the number of the population*. Suppose a State to be divided in two parts, one having a rich urban population, and the other a poor rustic population. One of the parts, in case of a division proportional to the number of the inhabitants, would be overburdened with debt, and the other considerably relieved, in comparison with the taxes previously paid, all to the great prejudice of the creditors."

(g) BONFILS.

Manuel de Droit International Public, by *Henry Bonfils*, Professor of the Faculty of Law of Toulouse, 3d edition, 1901 :

SECTION 223. "If a State ceases to exist by being broken up and divided into several new States, each of the latter ought to assume a portion of the debts which concerned the original State as a whole, and each of them ought also to take upon itself *exclusively the debts contracted for the exclusive benefit of its territory*."

SECTION 224. "The new State formed by the separation of a province, or by the destruction of the bond of vassalage, should equitably assume a part of the public debt of the State of which it was a fraction. The reason of this is evident. The debts contracted by a

State, in *the general interest*, have benefited all the provinces *in globo*, and the creditors had as a guaranty the wealth of all the provinces and the taxes which that wealth could bear."

SECTION 225. "Part of the territory of a State is ceded, annexed to another State. The annexing State should assume the contributive share of the annexed territory in the public debt of the ceding State. It is just that the State taking the cession should assume a part of the debts which, for divers reasons, directly or indirectly have benefited the territory with which it is enriching itself."

SECTION 226. "In the last mentioned cases, how shall the contributive share of the new State or of the annexing State be fixed? The authors are divided. Some fix upon the number of the population; others upon the extent of the territory. Bluntschli's opinion is better and juster. He determines the contributive share according to the share of the *taxes borne by the annexed or separated province. There is, indeed, a necessary correlation between the public debt of a State and the taxes imposed upon the inhabitants.* The latter constitute a guaranty for the former.

"The personal debts of the annexed, or separated, provinces, relating to local interests, naturally ought to continue to be the debts of these provinces, and should be paid by the annexing State, or by the newly founded State."

(h) FRANZ V. LISZT.

Das Völkerrecht, by *Dr. Franz v. Liszt*, Professor of the University of Berlin; second edition; Berlin, 1902:

Section 23, p. 175: The author, discussing the cession by a State of a part of its territory to another State, says:

"In any case, succession takes place as regards the so-called hypothecated debts (dettes hypothequées), that is, those debts which were incurred in the *exclusive interest of the ceded territory* (as for drainage works),

and as regards mortgage debts (dettes hypothécaires), that is, those debts for which real property situated in the ceded territory was pledged as security."

(i) Piédelièvre.

Précis de Droit International Public by *R. Piédelièvre* Professor of the Law Faculty of Rennes ; Paris, 1894 :

Section 154 :

" First question : Should the annexing State take upon itself a part of the *general debt* of the dismembered State ?

" The question is, in theory, at least, controverted. The negative solution is the less generally accepted. Its partisans take the ground that the dismembered State, however important a diminution of territory it suffers, nevertheless preserves its juridical personality intact, and conclude that it ought not to cease to be bound by the entirety of engagements, no more than an individual could take advantage of the loss of a part of his patrimony so as to escape in a similar proportion the fulfilment of his obligations.

" The contrary opinion, more usually announced, seems to us better founded. It involves two principal reasons. The first is that the debts contracted by a State with a view to the *general* utility of the inhabitants, weigh *indivisibly* upon all parts of the territory, and, consequently, if one part of the territory is detached, the part of the debt which was incumbent upon it ought to follow it into the hands of its new master ; the second reason is that these debts have served to realize improvements from which the annexed territory benefited in the past, and from which it may benefit again in the future ; that it is, therefore, equitable that the State to which the cession is made, as it is to have the fruit of these expenses, should assume an equivalent part of their payment."

Section 155:

"Accepting the principle of apportionment of the debt between the two States, there is still a difficulty to resolve: how shall the principle be applied? How are we to determine what share of the debt of the dismembered State belongs to the annexed territory? Several systems have been proposed.

"Some authors consider solely the *territorial* importance of the detached provinces, so that supposing the debtor State to have lost a fourth or a fifth of its total possessions, the annexing State would have to assume a fourth or fifth of the former State's public debt. While we recognize the simplicity of this system, we think it should be rejected, for the reason that the wealth of a country has less connection with its territorial extent than with the activity of its inhabitants and the direction it has taken. With equal extent of territory, an industrial region is evidently wealthier than a purely agricultural region. But the proposed solution does not take account of this fact; it wrongly supposes the wealth of a State to be mathematically apportioned among its provinces, in proportion to their territorial extent. In practice, the result would be to give one of the States concerned an advantage at the expense of the other.

"A second system has been proposed which is subject to nearly the same criticism: this is the system of dividing the public debt between the two States in proportion to the number of the *population* of the annexed provinces. To the foregoing observations we may here add that annexation generally has the effect of creating a current of emigration, the importance of which it is difficult to foresee, and for this reason, the governments concerned would have great difficulty in finding the basis for an equitable apportionment.

"A third doctrine remains, which seems to us the best. It is that the debts should be apportioned in proportion to the figure which represents, in the whole amount of *taxes* collected by the dismembered State, the taxes paid by the ceded territory. In fact, the

value of the different provinces of a State can only be measured exactly by the actual amount of the taxes paid by each of them. Besides, this system is easily applied and fully protects the rights of the creditors. The annexing State cannot complain, since before consenting to the cession it must have ascertained what were the rights and obligations of the annexed provinces with regard to the dismembered State, and the financial law which fixed the amount of taxes they were to pay sufficiently informed in respect to the debts with which it would be burdened in consequence of the annexation; on the other hand, there is no danger of the dismembered State's raising any objection in regard to the contributive share of the territory lost by it; for it fixed this share itself on the basis of the actual resources of the territory taxed.

Section 156:

"Whatever may be the solution adopted with reference to the question whether the annexing State, by reason of the annexation, ought to contribute to the payment of the public debts of the dismembered State, there are two categories of debts about which there can be no doubt:

"The first includes the *special debts* belonging to the annexed territory, that is to say, the debts which were contracted for their exclusive benefit, and which, like our departmental or communal debts, are not chargeable to the State. Diplomatic language calls them '*dettes hypothéquées*,' because of their particular destination. These debts the annexing State ought certainly to assume, or at least to cause them to be borne by the provinces which they specially affect. In any case, the *ceding State no longer has to pay them.* Thus by the treaties of Campo Formio of Oct. 17, 1797 (Arts. 4 & 10), and of Lunéville of Feb. 9, 1801 (Art. 8), France assumed the debts hypothecated on the soil of the ceded countries which were acquired or exchanged.

"The second category includes the mortgage debts

(dettes hypothécaires) : these naturally are charged to the State which becomes the proprietor of the real property securing their payment."

(j) RIVIER.

Principes du Droit des Gens, by *Alphonse Rivier*, Professor at the University of Brussels. Paris, 1826; Volume 1, p. 213 (Art. 40, V) :

" It is a general principle that ceded territory passes to the acquiring State just as it is, particularly carrying with it the obligations with which it is charged. '*Res transit cum suo onere.*'

" This principle, in the first place applies to obligations of a private nature, to the debts which specially belong to the ceded territory; the territory is transferred with its debts which remain special to it under the new sovereign as they were special to it under the old sovereign.

" This principle *should also be applied to the debts of the dismembered State* which *were contracted for the benefit of the ceded territory* and for the security of which that State gave pledges as mortgages in this territory; lastly, *the principle applies to the proportion* of the *national* debt of the dismembered State which ought to be taken over by the ceded territory.

" The authors disagree in regard to the disposition of the national debt in case of dismemberment of a part of the territory. According to some authors, the dismembered State continues to bear the whole burden. According to others, the debt is divided between the dismembered State and the annexing State, and this equitable system was put into practice in 1860 between France and Sardinia, in 1866 between Austria, Prussia and Denmark, between the Holy See and Italy, in 1878 between Turkey and the new States, Bulgaria and Montenegro. M. Appleton, and also M. Cabonat accept the principle of division, but between the dismembered State and the ceded territory 'we favor the division of the debt between the dismembered State

and the fragment detached therefrom.' *The proportion of the debt to be borne by the latter should be determined in accordance with the relative wealth of the detached portion and of the remainder of the dismembered State, and this wealth is disclosed by the taxes.*"

(*k*) FIORE.

Il Diritto Internazionale Codificato (International law codified), by *Pasquale Fiore*, Professor of International Law at the University of Naples:

Section 132:

> "In the absence of express agreement they" (the debts of the ceding State) "should be divided equitably upon the basis of the economic importance of the ceded territory, taking into account the proportional amount of the *taxes* borne by it."

Nouveau Droit International by *Pasquale Fiore*, Professor at the University of Naples; Paris, 1885.

Section 360:

> "When only a part of the territory is ceded the public debt ought to be equitably apportioned. On this subject we consider the principle laid down by Bluntschli to be correct, that the apportionment should *not be made proportionally to population.* In the case of mortgage or landed debts (foncierès), the State which receives the real property securing these debts, ought to assume their burden. Ordinary debts should be apportioned proportionally to the taxes paid by the respective parts of the territory."

(*l*) PRADIER FODÉRÉ.

P. Pradier Fodéré, *Traite de Droit International Public*; volume 1; Paris, 1885.

Section 156: The author states that the State to which cession is made is bound by *local debts* of ceded territory.

Section 157:

"But is the State receiving the cession bound by part of the other obligations resulting from treaties made with the ceding States and not attached to the ceded territory, merely because it has had the benefit of the cession? In other words, are obligations and rights, which are neither local nor personal, resulting from treaties made with a State, necessarily transmitted, in any proportion, to the State to which a cession is made, together with the ceded territory? *No. The ceding State alone remains bound or vested with rights, for it alone made the contract.* The same rule holds when, instead of being ceded, a province becomes an *independent State. The new State generally is not bound by non-local obligations of the State* from which it has separated. Such at least is the principle, but it can be modified in practice by treaty. Thus, the Kingdom of Italy, after the acquisition of Lombardy and Venice only took the place of Austria in regard to the local obligations and rights of the provinces acquired, and refused to take upon itself the payment of a portion of the *general debt* of the Austrian Empire." (Italics not the author's.) "So also no part of the French debt was imposed on the province of Alsace-Lorraine, which France was forced to cede to Germany in 1871. But—and this is an example of the exceptions which treaties can make from the general rule—the treaty of Berlin of 1878 imposed part of the public Turkish debt upon Bulgaria constituted an autonomous principality tributary under the suzerainty of the Sultan (Arts. 1 & 9), and upon Montenegro and Servia, whose independence was recognized (Arts. 26, 33, 34 & 42)."

(m) HUBER.

Max Huber, in his work on Staatensuccession (1898) says (p. 90 § 34):

"Without reference to those numerous cases in which a sum is fixed on account of the confusion of the

financial conditions and when, therefore, it is difficult to ascertain the separate proportions, we are confronted in the practice of international law with four different methods of the assumption of the debt :

" 1. Territorial division (*i. e.*, Geographical).

" 2. Division in proportion to population.

" 3. Division in proportion to the tax return of the original domain.

" 4. Division in accordance with the nationality of the creditors.

" In cases of doubt the most frequent and also the most equitable calculation of the sum to be assumed is the division in proportion to the tax return which the seceding country bears to the whole of the country."

(A reference (paragraph 226) shows that in the treaty between Prussia and Saxony, May 18, 1815, this was the basis of the division and in accordance with the agreement entered into August 28, 1819, between Prussia and Saxony, which provided for all of the details of the succession the *tax conditions* were used as a measure.)

" As in the countries of this day taxes are divided equally throughout the entire territory, the tax return of a particular portion of the country is a fairly accurate measure of its financial value to the state. Of course, the grantor always suffers a loss in favor of the grantee in so far as he loses the tax returns of the seceding country, but up to this time this has in no way been taken into consideration on account of the difficulty of the calculation.

" In confederations such as Switzerland this measure would, however, seem to be the only right way since the budgets of this country are based chiefly upon their duty returns. In such case only a division in accordance with the population would in case of necessity be permissible since the consumption of each individual country cannot accurately be known, while at the same time it may be assumed that the imports will be in proportion to the population, and that the more densely populated districts are as a rule the wealthiest.

(Page 92) : " The division '*pro rata regionis*' has no

reasonable basis since a mere extent of territory bears no direct relation to the fiscal value of the country nor with the political power of its government."

Section 136 (page 96). *Special Debts.*

Debts which arise out of a particular domain or which *have been incurred in the interest of a particular domain.*

"By reason of their legal nature these debts should also be considered together with those dealt with in the foregoing abstract (*i. e.*, debts borne by the entire state or country). The debtor is the entire country. The liquidation will arise out of the debts of the entire country. Only the purpose is a different one. Such debts arise either in the interest of a particular portion of a country or they may be assumed by the main government as an already existing debt of a particular portion of it, in which latter event, of course, this would relieve such smaller or particular portion. In this respect these are [illegible] debts of the main government in the interest of a particular portion of it.

"According to the European practice these debts are always assumed by the seceding state ; that is the seceding state has the obligation to assume them."

Section 272 :

"Certainly the territorial principle applies to debts which have reference to particular portions of the country. Regarding these, the owner of the particular portion interested incurs the indebtedness. We have designated these debts as 'special capital' and they should always follow the fate of their territorial foundation."

(n) APPLETON.

Henri Appleton makes the following statement in his book entitled : "Des Effets des Annexions de Territoires Sur Les Dettes de L'État Démembré ou Annexé," etc., *Paris, 1895.* Chapter IV., Section II., Section 65 :

"As soon as the principal is admitted that the debt of a

dismembered country should be divided between it and the State which takes one or more of its provinces, a new question arises. In what proportion shall the division be made? Very evidently the more important the annexation, the greater will be the contributory part to be charged to the annexing State. If a tenth of the dismembered country is taken, the annexing State will pay a tenth of its debt. If a fourth is taken, it will assume a fourth of the debt.

" But we must be precise. When a fourth, a tenth of the dismembered country is mentioned, is the reference to the extent of of its territory, to the number of its population, or to its wealth?

" What criterion shall we take, what basis must be adopted for such an apportionment?

On this point opinions have not always been in harmony. The practice has varied, and the authors themselves have not always agreed. We do not speak, to be sure, of authors like Hall, Dudley Field, etc., who leave the entire burden of its debts upon the dismembered State. For them the question cannot arise, and none of them treats it, because they reject the principle itself of apportionment. The problem exists only if one admits apportionment of debt in principle, whether from the point of view of payment, as we have treated the matter, or from the double point of view of collection and payment, as is generally done.

" Three systems of apportionment: on the basis of extent of territory, on the basis of population and on the basis of wealth, have been recommended and applied. In 1866 Italy took upon herself the papal debt in proportion to the population of the provinces of Romanra which she had conquered.

" The treaty of Berlin left the question in doubt. Bulgaria Montenegro and Servia, which took important territories from Turkey, were required in consequence of this to assume a part of the Turkish debt ' calculated upon an equitable basis.'

Section 66. " But at the present time one may say that the two first systems have had their day. The third system receives support from the unanimous opinion of the publicists and in practice. It seems to be the most just, and, in truth, the only really equitable system. Indeed, the extent of territory acquired by the annexing State cannot be taken as a criterion; if the conquered territory is that of a great city, the

conquest is infinitely more valuable than if it consisted of mountains or desert regions. The city has infinitely greater resources and furnishes more taxes, which enable the conqueror to assume a heavier part of the debt. As M. Cabouat says very well: 'With equal area, an industrial region is superior to a purely agricultural region, and even between territories of equal extent, devoted either to agriculture or to industry, it would be rash to affirm a constant equilibrium. Now, the system we are combating, completely ignores these facts; it reasons as if the wealth of a State could be mathematically divided among each of its provinces in proportion to their respective extents. Such a system could not be followed except upon the altogether chimerical hypothesis of dealing with the debt of an exclusively agricultural or manufacturing State whose various parts should have attained an equal degree of development. In practice the clearest result of such a system would be to procure for one of the interested States a reduction of the obligations incumbent upon it, and, consequently a gain, wholly at the expense of the other State.'

"An apportionment of the debt according to the number of the population inhabiting the annexed provinces would be subject to the same criticism. The new population acquired by the annexing State may be poor and capable of paying only small taxes; it may be, on the contrary, rich and prosperous. It would be unjust, in the two cases, to charge the annexing State with the same part of the debt. On the other hand, annexation always starts a current of emigration more or less strong. The population which the annexing State gains by annexation is always more or less inferior in number to that of the province at the moment of the annexation. This diminution, this decrease, cannot be foreseen, with any precision, at the moment of the treaty, and the apportionment which the negotiators might wish to make, would lack a solid basis."

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§ 67. "The conclusion drawn by the authors from these observations is that a single criterion is admissible: that of wealth. Wealth will be disclosed by the amount of taxes paid up to the annexation by the two portions of the dismembered State: the annexed portion and the portion which keeps its

independence. To eliminate as much as possible causes of error, the taxes taken are not those paid during the year preceding the annexation, but an average calculated over a space of several years. If the ceded province supplied a tenth, a fourth of the taxes levied by the ceding State, that State will be discharged of a tenth, a fourth of its debt. We are bound, like everybody else, to approve of this criterion. It is plain justice to take as a basis of apportionment, wealth as disclosed by taxation."

3. Application of International Law Doctrine in this Case.

Quotations from publicists have been indulged with much liberality in the hope that they may be found convenient to the members of the Court, also for the purpose of showing the unanimity with which they recognize the distinction, in respect of debt succession among nations, between a *general* or *national debt* and a *special* or *local debt*, and the consequences resulting from the distinction: and for the further reason that they supply the international law standard for debt apportionment, which counsel have assumed to be either area, population or taxable values, and that they agree that the latter is the just and adopted standard.

Even if the Court should be of opinion that the rule of international law does not govern the present case, yet if the Court, apart from the method prescribed by the Ordinance and notwithstanding the provision in the Constitution of West Virginia referring the matter for ascertainment to the legislature of that State, should undertake to determine the equitable proportion of the old Virginia debt which West Virginia should assume, then we submit that the Court cannot fail to give great weight to the authorities on international law which we have cited. The rules of international law are based entirely upon considerations of equity and fairness. They have no force nor sanction except from the consent of nations by reason of their evident justice. This Court, therefore, in determining what would be an equitable apportionment of the Virginia debt, would undoubtedly desire to take into most careful consideration the unanimous opinion of the modern international law authorities that, in apportioning the debt of a State after its division, equity requires a distinction to be

made between the portion of the debt which is local or special in its character and that which is general, so that the parent State and the new State are bound respectively to assume the whole of the *local debts* relating to their respective territories, leaving only the *general debt* to be apportioned on the basis of taxable value.

4. Recognition of Distinction between General and Local Debts in Division of Territory of Dakota.

The authority for the rule of International Law in the present case is peculiarly confirmed and strengthened by the fact that it was adopted and applied in the only case in our history which is directly analogous to the present case. We refer to the division of the Territory of Dakota into the two states of North Dakota and South Dakota. The territory of Dakota had a bonded indebtedness incurred for the purpose of erecting certain public buildings and institutions. It also had incurred certain other liabilities of a general character.

The Sixth Section of the Act of Congress providing for the division of Dakota into two States (25 U. S. Stat. at large, p. 676) required the constitutional conventions of North Dakota and South Dakota to appoint a joint commission, whose duty should be to agree upon an equitable division of all property belonging to the Territory of Dakota and to adjust and agree upon the amount of the debts and liabilities of the Territory which should be assumed and paid by each of the proposed states of North Dakota and South Dakota. The Act of Congress further required the agreement respecting the territorial debts and liabilities to be incorporated in the respective constitutions of the new States, and required each of them to obligate itself to pay its proportion of such debts and liabilities, the same as if they had been created by such States respectively.

A joint commission was duly appointed and made an agreement for the two new States respecting the territorial debts and liabilities, which agreement, in accordance with the enabling Act of Congress, was incorporated in the constitutions of North Dakota and South Dakota. The provisions concerning the apportionment of the territorial debt which we shall quote, are taken from the Constitution of South Dakota. (Similar provisions will be found in Art. 16 of the Constitution of North Dakota.)

Section 6 of Article 13 of the Constitution of South Dakota is as follows :

> " In order that the payment of the debts and liabilities contracted or incurred by or in behalf of the Territory of Dakota may be justly and equitably provided for and made, and in pursuance of the requirements of an Act of Congress approved Feb. 22, 1889, entitled ' An Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states,' the states of North Dakota and South Dakota, by proceedings of a joint commission duly appointed under said Act, the sessions whereof were held in Bismarck in said State of North Dakota, from July 16, 1889, to July 31, 1889, inclusive, have agreed to the following adjustment of the amounts of the debts and liabilities of the Territory of Dakota which shall be assumed and paid by each of the States of North Dakota and South Dakota, respectively, to wit : "

The agreement follows.
Paragraph 3 of the agreement provides :

> " The said State of North Dakota shall assume and pay all bonds issued by the Territory of Dakota to provide funds for the purchase, construction, repairs or maintenance of such public institutions, grounds or buildings as are located within the boundaries of North Dakota, and shall pay all warrants issued under and by virtue of that certain act of the Legislative Assembly of the Territory of Dakota, approved March 3, 1889, entitled " An Act to provide for the refunding of outstanding warrants drawn on the capitol building fund."

Paragraph 4 provides as follows :

> " The said State of South Dakota shall assume and pay all bonds issued by the Territory of Dakota to pro-

vide funds for the purchase, construction, repairs or maintenance of such public institutions, grounds or buildings as are located within the boundaries of South Dakota."

Paragraphs 5 and 6 specify the particular bonds to be assumed respectively by North Dakota and South Dakota, and specify the local situations of the buildings and institutions on account of which the bonds assumed by the two states were issued.

Paragraph 6 provides:

"The states of North Dakota and South Dakota shall pay one-half each of all liabilities now existing or hereafter and prior to the taking effect of this agreement incurred, except those heretofore and hereafter incurred on account of public institutions, grounds or buildings, except as otherwise herein specifically provided."

Paragraph 7 provides in part:

"Nor shall either state be called upon to pay or answer to any portion of liability hereafter arising or accruing on account of transactions heretofore had, which liability would be a liability of the Territory of Dakota had such territory remained in existence, and which liability shall grow out of matters connected with any public institution, grounds or buildings of the territory situated or located within the boundaries of the other State."

Paragraph 8 provides in part:

"A final adjustment of accounts shall be made upon the following basis: North Dakota shall be charged with all sums paid on account of public institutions, grounds or buildings located within its boundaries on account of the current appropriations since March 8, 1889; and South Dakota shall be charged with all sums paid on account of public institutions, grounds or build-

> ings located within its boundaries on the same accounts and during the same time. Each state shall be charged with one-half of all other expenses of the territorial government during the same time."

The court will observe that the apportionment of the debt of the Territory of Dakota between the new States of North Dakota and South Dakota under their agreement was absolutely in accordance with the rule of International Law that when a state is divided *local debts* must be assumed in their entirety by the state taking the territory with reference to which such debts were incurred. Each of the States of North Dakota and South Dakota assumed the bonds which had been issued on account of institutions located within its boundaries. General liabilities, on the other hand, were apportioned equally between the two States, as appears in paragraphs 6 and 8 of the agreement quoted above.

No contention can be made that this was merely the case of a special agreement, from which no principle of general application can be derived. The constitutions of the two States expressly declare the result of their agreement to be just and equitable. Section 6 of Article 13 of the South Dakota Constitution (a similar provision will be found in paragraph 3, section 203, Article 16 of the North Dakota Constitution) declares:

> "In order that the payment of the debts and liabilities contracted or incurred by and in behalf of the Territory of Dakota may be *justly and equitably* provided for and made * * * the states of North Dakota and South Dakota * * * have agreed to the following adjustment of the amounts of the debts and liabilities of the Territory of Dakota," etc.

Hence the apportionment of the debt of the Territory of Dakota can only be regarded as an equitable settlement between the two states. The full recognition in this settlement of the distinction between *local* and *general debts* not only confirms the doctrine of International Law on this subject, but must impress the court as an unique and valuable precedent for the purposes of the present case.

5. Distinction Between General and Special Debt Discussed in Negotiation of Treaty Between United States and Spain.

His Honor Mr. Justice Day will remember that the distinction between a *general* or national debt and a *special* or *local debt*, from the standpoint of international law, involved a prolonged discussion between the American and Spanish Commissioners at Paris in negotiating the Treaty of Paris, under which the United States secured to Cuba her independence and brought under our sovereignty Porto Rico and the Philippines. The Spanish Commissioners contended that the United States should assume, either for herself or for Cuba, that portion of the indebtedness which had been incurred and for which Spain had issued obligations *primarily secured by an hypothecation of the revenues of Cuba.* They contended that it was, to all intents and purposes, a Cuban debt; in other words, *local or special*, as contradistinguished from the *general or national* debt of Spain. The American Commissioners, recognized the distinction, but refused to accede to the demand of Spain, upon the ground that Cuba had had no debt, but, on the contrary had been a self-supporting colony, and that the indebtedness was incurred, and its proceeds used to wage war upon Cuba, and to resist by arms the aspirations and struggles of her people to be freed from long-continued despotism and misrule and was a part of Spain's *national* or *general debt.*

If we had taken over Cuba in the absence of *strife between Cuba and Spain and the United States and Spain*, and *there had been found an indebtedness incurred by Spain*, the *proceeds of which had been expended in public improvements in Cuba and for the benefit and betterment of the Island and its inhabitants*, the question would have been a different one, and from the standpoint of international law and justice, our attitude must have been different.

6. The Distinction Between General Debt and Local Debt Is Substantial and Just.

And this distinction between a *general* and a *special* or *local debt* is a substantial one. It rests upon a sound princi-

ple, and is essentially just. Obviously, there is no such distinction when we consider the relation of a State and its creditor. There, the purpose for which the loan was effected is immaterial; but, in respect of the apportionment of the debt of a State between itself and a new State, erected out of its territory, the distinction is not only apparent but important.

A *generel debt*, using the phrase as the publicists use it, with reference to debt succession, one would say is a debt, the object and result of which inures to the benefit of all the people subject to the dominion of the State, the expenditures of which are not susceptible of localization, and which cannot be said to benefit one section more than another, or one class of citizens more than another.

The debt incurred by the United States during the war in maintaining the Union would fall, from every standpoint, within the definition of a *general debt*. It was to preserve the Union as the Fathers made it, and its benefits inured to all the people in all the states.

If the Southern Confederacy had become an established government, a nation, the indebtedness which it had incurred in the establishment of that government would have been a *national* or *general debt* as contradistinguished from a *special* or *local debt*.

This expenditure of its proceeds would have been made for the general and indivisable benefit of the people living under its sovereignty.

Such a debt is not, in its nature, apportionable except by special agreement, or, ratably upon some basis recognized by international law.

On the other hand, the *special* or *local debt*, however large it may be, incurred by a State or a nation, upon a division which results in the erection of a part of the national territory into another nation or State, *apportions itself*.

If it had happened that every dollar of the public debt of the Commonwealth of Virginia, prior to January 1, 1861, had been expended in the construction of railways which Virginia owned, and canals and public buildings, toll highways, improved navigation, the utilization of which by the public required the payment of tolls, all owned by Virginia and within her borders, after the separation, could it, with any justice, be said that West Virginia, upon the division of the two states

and the erection of West Virginia into a State, should in equity assume any portion of that burden, when not a dollar of the money had been expended within her territory, and if there were not within it a work of internal improvement erected by Virginia out of the proceeds of that debt? Such improvements are on the land, and, of necessity, are transferred with it.

Suppose, on January 1, 1861, the only debt resting upon the Commonwealth of Virginia had been a debt of $10,000,000, the proceeds of which had all been *directly expended within the limits of the present State of West Virginia, and thereupon for the benefit of its people*, in the construction of railways and public buildings, in the making of highways and other improvements, important in their character and beneficial to that people remote from tide-water, and West Virginia had been admitted as a State into the Union, with no provision as to apportionment of debt. Can there be any doubt, upon principles of International Law, and upon principles of common justice, that it would *have been the duty of the new State to take that entire debt upon her shoulders?* It would have been incurred with reference to her territory. It would have been expended within her limits, and for her benefit. Although such a debt, like any other, as between Virginia and her creditors, would have bound Virginia, yet, as between Virginia and West Virginia, it would have been a special debt which West Virginia ought to assume and pay. If this proposition is not sustained by all writers on International Law who have touched the subject, we are mistaken. What answer could West Virginia have made to it? Between nations, a refusal to adjust it upon that basis might very well have resulted in war.

7. The Public Debt of Virginia Prior to January 1, 1861, was a Local or Special and not a General Debt.

It is averred in the first paragraph of the bill, that:

> "On the first day of January, 1861, your Oratrix was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory."

It is admitted, in the first paragraph of the answer :

> " That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in 'about' the sum of $33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvement within her then territory."

The investigation before the Master, as shown by the exhibits, clearly makes it appear that Virginia had no *general* public *debt* in 1823, and that the $33,000,000 was expended in works of internal improvement.

Here we are logically led to an analysis of this debt and of the purposes for which it was incurred and the expenditure of its proceeds.

8. The Nature of the Debt, as Shown by the Legislation Under Which It Was Incurred.

Let it be said first, that Virginia, in 1823, the initial year of the period ending with December 31, 1861, during which the debt of the Commonwealth here involved was created, appears to have had outstanding no general debt.

Virginia embarked early on a system of internal improvement. She passed, on February 5, 1816 :

> " An act to create a fund for internal improvement, to be applied exclusively to the purpose of rendering navigable and uniting by canals the principal rivers, and of more intimately connecting, by public highways, the different parts of this Commonwealth."

This fund consisted of the shares held by the Commonwealth in the stock of the following companies ; Little River Turnpike Company, Dismal Swamp, Appomattox, Potomac and James River Canal Companies of the Bank of Virginia and also the Farmers' Bank of Virginia,

> " together with such dividends as may from time to time accrue to such shares of stock, and such bonds and

premiums as may be hereafter received for the incorporation of new banks or the augmentation of the capitals or the extension of the charters of existing banks."

She, at the same time, provided that, for the purpose :

"of preserving and improving this fund, and of disbursing such portions of it as the General Assembly may, from time to time, direct to be applied to any object of internal improvement, it shall be, and the same is, hereby, vested in a corporate body to be styled 'the President and Directors of the Board of Public Works,' in which name they shall have a common seal, etc."

The Governor was made, *ex officio*, the President of the Board of Public Works. The Directors were to consist of the Treasurer and Attorney General of the Commonwealth, for the time being, and of ten citizens thereof, three of whom were to reside westward of the Alleghany Mountains, two between the Alleghany and the Blue Ridge, two between the Alleghany and the Great Post Road, and the residue between that Road and the sea coast.

The act provided that the fund should be deposited in the Treasury, subject to the order of the President and Directors of the Board, paid out or delivered by the Treasurer of the Commonwealth upon the order of the Board, and required accounts of the disbursements and the certificates upon which the same shall have been made to be preserved, and an annual account to be rendered to the General Assembly.

Section 11 provided that the President and Directors of the Board of Public Works shall be, and they are hereby, authorized to subscribe, in behalf of the Commonwealth, to such Public Works as the General Assembly may, from time to time, agree to patronize, such portions of the fund for internal improvement as may be directed by law ; but that no part of the said fund shall be subscribed towards the stock of any canal, turnpike or other company until three-fifths at least of the whole stock necessary to complete such canal, turnpike or other public work of such company, *shall have been otherwise subscribed ;* or until, of the stock so

subscribed, one-fifth thereof shall have been actnally paid by the resident subscribers, or the payment thereof effectually secured by bond of approved security, or a deed of trust upon the real estate of such subscriber, of twice the value of such one-fifth part; such bond to be taken payable to the President and directors of the company authorized to complete such public work.

It was then provided that the dividends on the stock subscribed by the President and Directors of the Board of Public Works should go exclusively to other subscribers than the Commonwealth until such portion of the stock of those subscribers shall have netted to them six per centum per annum from the specified time of such payment; that any increase of profit after that net income should have been assured to the subscribers, should belong exclusively to the fund for Internal Improvements, until the net annual income of the whole stock actually expended by any company shall reach six per centum per annum;

> "*after which the Commonwealth and the other subscribers to the stock* of the company shall divide the net profits on such stock in proportion to their respective interests."

It then provided that the President and Directors should vest in some productive fund the undivided dividends accruing upon any of the stock, until the same was specially appropriated by law to some internal improvement; and adds:

> "And shall have power, subject to the control of the General Assembly, to sell, from time to time, as may be ordained by law, the whole or any part of the shares held by the Commonwealth of the stock of any canal, turnpike or other company subscribed for under the provisions of this Act, *for the purpose of investing the proceeds of such sale in the stock of some other similar company*, subject to the like conditions as have been before expressed in this Act."

The Board of Public Works were given power, in behalf of the Commonwealth, to appoint such number of directors of

every public work as shall bear to the whole number of directors of such work the proportion of the Commonwealth's shares of stock in such work, which may be subscribed in pursuance of this Act to the whole number of shares thereof.

Section 16 provided :

> " That the public faith shall be, and the same is, hereby, solemnly pledged to fulfill the obligation of this Act, and that the said appropriation shall continue in force until the first day of January of the year one thousand eight hundred and sixty-six ; except at such times as the United State of America may be involved in war, or the safety of this Commonwealth, may, in the opinion of the General Assembly, require, when the General Assembly may, withdraw (during the period of actual hostilities or of such imminent danger) the whole or any part of such fund, for the purpose of defense, provided such withdrawal can be made without a violation of any engagement made under this Act."

The provision above quoted, by which the State withheld herself from dividends until the citizen subscribers had netted six per cent. on what they had paid in, was changed by an Act of February 20, 1829, Chapter 21, in which it was enacted :

> " And all dividends upon subscriptions hereafter authorized or required to be made by the General Assembly to any canal, road, bridge company or other corporation, shall be made and stand upon the same footing with subscriptions made by individuals."

The Legislature of the Commonwealth passed February 7, 1817, Chapter 38, a General Act providing certain general regulations for the incorporation of turnpike companies, entitled :

> " An Act prescribing certain general regulations for incorporation of turnpike companies."

This Act provided that :

> " Whenever it may be deemed expedient for the General Assembly to make a turnpike road, and an Act

shall actually pass the General Assembly for such purpose, the following general provisions shall be deemed to be contained as part of the said charter or Act of incorporation, as if the same had been actually re-enacted in reference to such grant or charter, except in so far as such grant, charter or Act may expressly provide."

And then provides that:

"The Commissioners named in any special act, or a majority of them, shall have power to open books for subscriptions to the stock at the places named in the Act, and to divide the capital stock into as many shares, not exceeding One hundred dollars each, in amount, as they may deem proper, to appoint any number of Deputy Commissioners, to open books of subscription to the stock of the company, and the subscriptions shall be made and the payment of moneys received on subscriptions to the President and Directors by the Commissioners; that the books shall remain open until at least one-half of the capital stock of the company shall have been subscribed, when a general meeting of the subscribers is to be called by the Commissioners,"

and provided other details for the purpose of organization.

It also prescribes the tolls which may be exacted, and provides for changing them, either raising or lowering the amounts, upon certain contingencies.

By Section 28, it is provided that:

"If the said President and Directors do not begin the said work within two years after the passage of the Act for *incorporating* the company, or shall not complete the same within ten years thereafter, in the manner hereinbefore directed, then the interest of such company in the said tolls and roads aforesaid shall be forfeited and cease."

It provides for reports of the receipts and profits to the Board of Public Works.

It also provides that:

> "If the Commonwealth shall desire to purchase the stock of such company, and shall vest authority to make such purchase in any person, corporation or body politic, it shall not be lawful for the *proprietor* of any such stock to sell or transfer the same to any person whatever until he shall actually and with good faith have offered the same for sale, for the price for which he is willing to take therefor, to the person, body politic or corporation, authorized to purchase by the Commonwealth."

And also provides that after such offer to such person, body politic or corporation, no transfer or assignment to any other person, shall be entered or registered in the books of such company, or vest any right whatever, unless it shall have been proven to the satisfaction of the President and Directors that the stock so transferred had been, with good faith, previously offered to the person, body politic or corporation, so authorized, at a price at least as low as that at which it had been sold to such assignee or transferee.

A General Act was passed February 11, 1832, prescribing certain general conditions on which subscriptions to certain joint stock companies shall be made on behalf of the Commonwealth. This Act provides as follows:

> "That all subscriptions which are now authorized by law and have not been made by the Board of Public Works, or which may hereafter be authorized, shall be subject to the following conditions and provisions, to wit:
>
> "In every case the Board of Public Works shall be furnished with a certificate under the seal of the company signed by their Treasurer and countersigned by their President, stating that at least one-fourth of the private subscriptions of not less than three-fifths of the capital stock has been actually paid up into the hands of such treasurer, and the remainder of such subscription is either so made or is made by solvent persons fully able to pay, and these facts shall be shown to the

satisfaction of the Board of Public Works. They shall also be furnished with a list of the stockholders, showing a list of the shares standing in each name."

(The provision with reference to the proportion of capital stock subscribed by individuals was afterwards changed to "two-fifths," so that the State took three-fifths and private stockholders were permitted to take only two-fifths.)

If any private improvement shall have been commenced previously, and the subscriptions thereto have been authorized or made, the Board of Public Works shall be furnished with a statement showing the amount of money received up to the date of such statement, and of the amount expended in the work, together with the balance of money on hand, the contracts entered into for the construction of the improvements, the exact progress made therein, as near as may be, its dimensions and a correct map of its location.

The section provided:

"Instalments of future subscriptions of the Board of Public Works shall be applied in the manner and on the conditions hereinbefore mentioned when not otherwise specifically provided by law; that is, one-fourth of such subscription shall be paid on the production of the draft of the Treasurer or other authorized agent of the company, in the manner and in such form as the Board of Public Works may prescribe, and the remaining three-fourths on similar drafts, in six equal semi-annual instalments or in instalments *of the same proportions with future payments or private subscriptions at the discretion of the Board of Public Works.*"

It also provided that:

"Before payments of the instalments aforesaid, the Board of Public Works shall be furnished in every case with a certificate in the form and manner required by the first section of this Act, showing the amount actually paid up by the private stockholders, which amount must be at least equal to the amount payable by the Board of Public Works."

It was the evident purpose of the Commonwealth from the beginning to render susceptible of easy ascertainment the identification of each loan with the particular improvement for which it was authorized by special act of the Legislature to be made. Thus, by Chapter 117 of the Laws of 1834, which authorized the borrowing of money on the credit of the State at a rate of interest not exceeding five per centum for sums of money not less than $30,000, and not exceeding $60,000, it is provided:

> "That the moneys so to be borrowed shall be paid into the Treasury upon the warrant of the Second Auditor, and upon the receipt in the treasury of the sum or sums so borrowed, the Treasurer shall issue his certificate of loan for the amount thereof, purporting that the Commonwealth of Virginia owes to the lender, his heirs, executors, administrators or assigns, the principal sum so borrowed, together with the interest at the rate of interest agreed upon, and that the interest so agreed upon is payable semi-annually at the treasury of the Commonwealth. *Such certificate shall show on the face thereof that the loan was made under authority of this Act.*"

And this principle was embodied, as the Court will see, in Chapter 12, Laws of 1838, providing for the negotiation of loans for internal improvements, a general act, the pertinent portions of which are as follows;

> "First, that all loans hereafter authorized by law for the payment of subscriptions on behalf of the Commonwealth to the capital of joint stock companies *incorporated* for purposes of internal improvement or for defraying the expense of any work or internal improvement in which the State is or may be interested, as well as all loans heretofore authorized, shall be negotiated according to the provisions of this Act, except so far as may be otherwise specially provided by the Acts authorizing the loans.
>
> "Second, the Board of Public Works in effecting such loans shall borrow upon the credit of the Com-

monwealth at the lowest rate of interest at which the necessary amount can be obtained, not exceeding in any case five percentum per annum. Upon the payment of the moneys so borrowed into the treasury, which shall be done upon the warrant of the Second Auditor, the Treasurer shall issue a certificate or certificates of loan for the amount thereof purporting that the Commonwealth of Virginia owes to the lender, his heirs, executors, administrators or assigns, the principal sum so borrowed, together with the interest at the rate agreed on; and that the interest is payable semi-annually at the treasury of the Commonwealth, *and that such certificate or certificates were issued under authority of a special act authorizing such loans;* which certificate shall be signed by the Treasurer and countersigned by the Second Auditor and be registered in a book to be kept for that purpose by the Second Auditor, and shall be transferable on the books of his office in person or by attorney." * * * "All loans negotiated in conformity with this Act shall be irredeemable for twenty years and shall afterwards be redeemed at the pleasure of the General Commonwealth.

"Third, for the payment of the interest and the final redemption of the principal of any sum to be borrowed in conformity to this Act, the stock of any joint stock company subscribed for or purchasd with the moneys so borrowed, together with the dividends and other net income which may accrue therefrom to the Commonwealth or to the fund for internal improvement, shall be and the same are *hereby appropriated and pledged; and in like manner the net income and other profits which may accrue from works in which the State is interested other than those of joint stock companies, and on which the money borrowed is to be expended,* shall be and the same are likewise hereby *appropriated and pledged for the payment of the interest and redemption of the principal of the moneys so borrowed;* that if the stock aforesaid and the said dividends, net profits and other income shall be inadequate to the payment of the said semi-annual interest and the final redemption of the principal of the

respective loans, the General Assembly pledges itself to provide other and sufficient funds, and for that purpose to levy any necessary and adequate taxes upon any or all subjects liable to taxation under the Constitution."

The Act provides that:

"If the dividends and income arising from the stock or work as aforesaid, together with the fund for internal improvement, shall be insufficient to pay all interest due upon the loan when demanded, the Auditor of Public Accounts shall, upon the application of the Board of Public Works, issue his warrant upon the treasury directing the payment of such interest out of any moneys therein not otherwise appropriated, and in case of the inability of the treasury at any time to discharge such warrants, the Board of Public Works shall be and they are hereby authorized to borrow the necessary amount from the banks of this State at a rate of interest not exceeding six per centum per annum, on the credit of the Commonwealth, to be repaid in such manner as the General Assembly may by law direct."

By Section 5 the Board is authorized and empowered to procure any or all of the loans authorized by law, either in the United States or in Europe, as they may deem most advantageous to the public interest, and for that purpose to appoint one or more agents with necessary powers, and to allow him or them such compensation as they may deem reasonable; also that as to European loans they may provide for the payment of interest on the same semi-annually in London or elsewhere, and may stipulate for the payment by the lenders of the amount of such loans in England or elsewhere, conforming the certificates to be issued to the terms of the loans.

It appears in the case that during the debt period, between 1823 and 1861, a large number of stock corporations were created to build works of internal improvement, of one kind and another, to whose stocks the Board of Public Works, under this legislation, subscribed on behalf of the Commonwealth, for a time, for two-fifths, and for another time, for three-fifths, but never until, in the one case three-fifths, and in the other,

two-fifths, had been subscribed by *solvent private citizens*, and a required sum paid in *on the private subscriptions*. Moneys were borrowed in sums, great and small, from time to time, to pay these stock subscriptions of the Commonwealth. This applied to turnpike companies, bridge companies, navigation companies and railway companies. And the State also subscribed a large amount to the stock of banks incorporated by her legislation and issued bonds in payment of her subscription.

The record shows that Virginia expended about $4,000,000 more than the $33,000,000 debt on works of internal improvement, out of moneys raised by taxation. In some instances she expended through her Board of Public Works directly the proceeds of loans.

In respect of all of the debt, the proceeds of which were expended in West Virginia, the schedules show that the loans which she effected were numbered as required by law, the certificate of debt or certificates of debt, referring to the act which *authorized the particular expenditure*, so that it is not only true that the debt represents expenditures for internal improvements, but it is true, so far as the expenditures in West Virginia were concerned, that the moneys which were expended, the proceeds of loans, are traceable to the particular improvements and the stocks and dividends thereon were pledged for the repayment of the loan.

An examination of Complainant's Exhibit A-2, which shows the form of bonds, will disclose that each loan was numbered; so that while the aggregate amount of the debt is very large, it is composed of a vast number of separate, relatively small loans, each susceptible of identification, and the proceeds of each traceable to the particular improvement for which the loan was authorized to be made, so that each loan was localized.

By Chapter 8, Laws, passed March 27, 1839, page 9, it was provided:

> "It shall be lawful for the Treasurer of the Commonwealth, and he is hereby directed upon the requisition of the Board of Public Works, *and without requiring the previous payment of money into the Treasury on account thereof*, to issue certificates of stock for the amount of any loan or loans which are now or may hereafter be

authorized by law, to procure for private or internal improvements, payable in currency of the United States or that of any European State, and in such form and with such conditions and stipulations, *not inconsistent with law*, as the said Board shall direct, which certificate shall be countersigned," etc., etc.

This phrase "not inconsistent with law" preserved the identification of the loan with the particular improvement as provided by the Act of 1838 above quoted.

As it was a general provision of law, the presumption is that the same thing is true of the loans, the proceeds of which were expended within Virginia, or in the purchase of stocks of corporations whose improvements were within her present limits.

PART THIRD.

The Rule of Public Law Does Not Govern this Case Because the Wheeling Ordinance and the Constitution of West Virginia Constitute a Special Agreement as to the Proportion of the Old Virginia Debt to be Assumed by West Virginia.

Even if the Court should not recognize the distinction between *general* and *local debts*, the present case is within the exception to the rule of international law as stated by Mr. Justice FIELD in that the matter of the division of the public debt was the subject of a Special Agreement between the two States evidenced by the 9th Section of the Wheeling Ordinance and Section 8 of Article VIII of the Constitution of West Virginia.

1. SECTION 9 OF THE ORDINANCE.

The pertinent portion of the Ordinance is as follows :

> "9. The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted ; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new state during the same period. All private rights and interests, in lands within the proposed state, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the State of Virginia.
>
> "The lands within the proposed state of non-resident proprietors shall not, in any case, be taxed

higher than the lands of residents therein. No grants of lands, or land warrants issued by the proposed state shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last which shall be located on lands within the proposed state now liable thereto."

2. Section 8 of Article VIII. of West Virginia Constitution.

Section 8 of Article VIII. of the Constitution, "Taxation and Finance," is as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one shall be assumed by this state; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

3. Two Views of Opposing Counsel in Relation to the Ordinance.

Two views are taken in relation to the Ordinance and the quoted provision of the Constitution by opposing counsel. The learned counsel who represents the "bondholding creditors of Virginia" contends in his brief (p. 38):

> "The Ordinance, as shown by its title, was to provide for the formation of the new state. Two of its sections, except the Ninth, were directed toward that end. The state was formed when its constitution was framed and adopted by the people. The ordinance then became *functus officio* and ceased to have any operation."

It is hardly to be expected that a lawyer, in the changing fortunes of a great litigation, can always be entirely consistent. The learned counsel has stated that he drew the bill, by the filing of which this suit was inaugurated. In

that bill, page 4 (May's Comp.), is set forth the Ordinance, followed on page 6 by several quotations from the first Constitution of West Virginia, including Section 8 of Article VIII.

Paragraph 18 of the bill is as follows (p. 10):

> "Your Oratrix charges that the liability of the State of West Virginia for a just and equitable proportion of the *public debt* of Virginia as of the time when the State of West Virginia was created, rests upon the following among many grounds which *might* be indicated here:
>
> "*First.* The area of the territory now known as the State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this *public debt* was created, and its population included about one-third of that of the original state at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the *public debt* created prior to the partition of such territory.
>
> "*Second.* The *liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia as it existed prior to the creation and erection of the State of West Virginia forms part of her very political existence,* and *is an essential constituent of her fundamental law,* as *shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a state into the Federal Union,* and was *one of the conditions under which she was created a State and admitted into the Union.*"

The learned counsel for the bond-holding creditors says, in his brief (page 37):

> "The tenth section of the ordinance provides for the erection of a new State", etc. "When the General Assembly should give its consent, to the formation of the new State, it should forward to the Congress of the

> United States such consent, together with an official copy of such Constitution, with the request that the new State may be admitted into the Union of States."

He adds:

> "It did not provide that a copy of the ordinance should be forwarded to Congress, and there is nothing in this entire record to sustain the assertion that Congress ever saw or heard of that ordinance or of its provisions."

It may be true that there is nothing in the record, technically speaking, to evidence the fact that the Ordinance was before the Congress, and accessible to its members, at the time the bill for the admission of West Virginia was being considered and passed. That depends upon what the record in this case is; but some things the Court will take judicial notice of. In many instances, it has taken judicial notice of the archives of the Government and the legislative history of measures before it, the construction and effect of which have been here involved. It has taken judicial notice of records of the Treasury Department, of the records of the Congress in respect of the history of measures, or amendments offered and adopted or rejected, and of reports of Committees.

It is said in our brief, filed on the argument of complainant's motion to refer cause to Master (page 42) as follows:

> "It ought here to be stated that the Constitutional Convention of West Virginia appointed three Commissioners to that end, also that the Commissioners presented on May 31, 1862, to the United States Senate a memorial praying for the admission of that State into the Union, addressed to The Honorable B. F. Wade, Chairman of the Committee on Territories, in which they gave a history of the proceedings which led to the organization of the restored government of Virginia, *and which included at length the ordinance adopted on the 20th of August, 1861, by the Convention at Wheeling, entitled, 'An ordinance to provide for the formation of a new State out of a portion of the territory of this State,' which, on the 31st day of May, 1862, was referred by the*

Senate to the Committee on Territories and ordered to be printed (Congressional Globe, p. 2451; 37 Cong. 2d Session, Misc. Senate Doc., No. 99)."

The Congressional Globe, being a public document, giving the proceedings of co-ordinate branches of the Government, this Court will, undoubtedly, under the authorities, take judicial notice of the fact that it was presented to the Senate, that it was ordered by the Senate and referred to the Committee on Territories. That the order to print the usual number, which supplies both Houses, was obeyed, the Court will presume.

The Paquette Habana, 175 U. S., 712.
United States vs. Whittridge. 197 U. S., 135.

4. VIRGINIA IS NOT IN A POSITION TO INSIST UPON THE ELIMINATION OF THE ORDINANCE FROM THE CASE.

Neither the learned counsel, nor the Commonwealth of Virginia, is in position to insist upon the elimination of the Wheeling Ordinance from this case. In 1871, *years after the adoption of the Wheeling Ordinance* and the *Constitution of West Virginia*, the Commonwealth of Virginia passed a Funding Act, the preamble of which (May's Comp. 14, Exhibit No. 1) of the bill, reads as follows:

> " WHEREAS, in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and
>
> " WHEREAS, in the *ordinance authorizing the organization of said State it was provided* that the *said State shall take upon itself a just proportion* of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, *which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State*, and *will continue to be made as long as may be necessary;* and
>
> " WHEREAS, the people of this Commonwealth are anxious for the prompt liquidation of her portion of

said debt, which is estimated to be two-thirds of the same ; and

" WHEREAS, it has been suggested that the authorities of West Virginia may prefer to pay that State's portion of said debt to the holders thereof, and *not to this State, as the Constitution of this state provides ;*

" NOW, THEREFORE, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt, as the same shall become due ;

" THEREFORE, BE IT ENACTED : "

And the Act proceeds to fund *two-thirds* of the debt, and to provide for the issue of certificates of Virginia for the remaining *one-third*—the payment of which

> " will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia in existence at the time of its dismemberment."

We find here a legislative recognition of the ordinance as the sole evidence of the assumption by West Virginia of a proportion of the public debt of the Commonwealth prior to January 1, 1861. The legislature of Virginia evidently regarded it as not *functus officio*, although the constitution had been adopted for some years ; and this legislative declaration was despite the fact that Virginia, in her constitution adopted in 1864, which was the only organic law of the State until 1870, had attempted in express terms to repudiate the ordinance, so far as it related to the debt.

Section 27 of Article IV. of the Constitution of 1864 is as follows :

> " SECTION 27. The *General Assembly shall provide by law for adjusting* with the State of West Virginia

> the proportion of the public debt of Virginia proper to be borne by the States of Virginia and of West Virginia respectively * * * and no *ordinance passed by the convention which assembled at Wheeling on the 11th day of June, 1861, adjusting the public debt between Virginia and West Virginia shall be binding upon this State.*"

5. VIRGINIA DOES NOT CONTEND THAT THE ORDINANCE HAS CEASED TO BE BINDING.

The legislation of Virginia, upon which was based her Funding Act, honorably ignored this attempted repudiation of the ordinance, and in the argument on the submission of a draft of a proposed decree the distinguished lawyer who represented the State as its Attorney-General, now of counsel, in a brief filed here, said :

> " While the basis of settlement prescribed by the Wheeling ordinance is, as we have always considered it, arbitrary and inequitable, we *have never taken the position that that ordinance, reasonably and fairly construed, and taken and applied together with the act of the restored government of Virginia of February 3, 1863,* and Section 8 of Article VIII. of the Constitution under which West Virginia became a State, *was not binding on both States.*"

The learned counsel who argue for Virginia here, in their notes of argument, do not quite contend that the ordinance became *functus officio* by the adoption of the Constitution.

On page 13 of their " Notes of argument," they say :

> " Now the insistence of Virginia has been, and is, that West Virginia should be charged with an equitable proportion of the debt, to *be ascertained under the Wheeling ordinance, construed so as not to defeat the express controlling purpose of its enactment* and qualified and ruled by the provisions of Article 8 of the West Virginia Constitution upon which the consent of the legislature and of the Congress of the United States to the formation of the new State was predicated.

> "Agreeably to the decision of this Court, in its opinion delivered by the late Chief Justice (R., 136), the view of Virginia is, and has been, that the ordinance and the provisions of the West Virginia Constitution, should be read as being in *pari materia*, but that the constitutional provision being the latest, must prevail whenever there is any conflict between them."

And it is then said,

> "as a logical and inevitable consequence from this, that the claim of Virginia was and is that if the language of the Wheeling ordinance is fairly and reasonably susceptible of such a construction as will, when fairly applied to the facts of the case, lead to an equitable result, and place upon West Virginia an equitable proportion of the debt, such construction should be given to that ordinance; and that if the language of the ordinance is not reasonably and fairly susceptible of such a construction, *then the ordinance must be discarded*, and the *mandate* of the *West Virginia Constitution followed;* and that in any event the provisions of the Constitution will govern in placing a contractual obligation upon West Virginia to pay an equitable proportion of the debt of the undivided state and to pay interest upon the same from the date when that express contractual obligation accrued until it shall have been discharged. But the claim of Virginia is that the provisions of the Wheeling ordinance, fairly, sensibly and justly construed, and applied according to its manifest purpose, places upon West Virginia a just and equitable proportion of the debt, and that West Virginia cannot be heard to repudiate this result in her express covenant and promise."

In other words, the attitude of counsel for Virginia is, that if the Ordinance, fairly, sensibly and justly construed, brings about a result which, in the opinion of the Court, is an equitable proportion of the public debt of Virginia, prior to 1861, to be assumed by West Virginia, the Ordinance is binding; but if the Court shall be of opinion that the Ordinance, construed in

accordance with the settled rules of construction, does not produce a result which the Court regards as an equitable proportion of the public debt of Virginia, prior to 1861, to be borne by West Virginia, it was repealed by the Constitution, and is no longer to be considered.

6. There Is No Conflict Between the Ordinance and the Constitution.

We contend that the Ordinance is to be construed as any other contract would be construed; that its language is plain, and that the general words of assumption with which it begins cannot control the clear and special provisions which follow. We insist that there is no conflict between the the Ordinance and Section 8 of Article VIII. of the Constitution. The Ordinance contains substantially two provisions concerning the only matters with which the Ordinance would naturally deal:

(1) that the proposed new state shall take upon itself a just proportion of the *public debt* of the Commonwealth of Virginia prior to the first day of January, 1861,

(2) the method by which it shall be ascertained which is clearly prescribed.

Two things the ordinance naturally and properly omitted:

(1) It made no provision as to the agency or tribunal whose duty it should be to ascertain the proportion by pursuit of the method prescribed by it.

(2) It made no provision for the payment of the just proportion when ascertained. These matters were left to the Constitutional Convention. In other words, the Constitution supplies the provisions omitted from the Ordinance which would obviously be necessary to carry it into execution. The one is a supplement of the other, and there is no conflict between them, nor can any be claimed, but it is contended that if the method prescribed by the Ordinance does not bring about a result which Virginia thinks is equitable, the Ordinance then becomes *functus officio*, and Section 8 of Article VIII. of the Constitution constitutes the entire compact between the two States. This is based upon the fact that the ordinance uses the word "just" as qualifying the word "proportion," and the constitutional provision uses the word "equitable." It is not to be doubted,

we think, that the two mean, as here used, the same thing. The Constitutional Convention was provided for by the Ordinance. It met and adopted the constitution within ninety days of the adoption of the Wheeling Ordinance.

It is stated in the brief of the learned counsel for the "bondholding creditors" that the same territory was represented in both bodies, and to a large extent by the same men. Probably no constitutional convention ever assembled in this country under such circumstances. It was in the midst of war, at a time of excitement and passion. There is no reason to suppose that the men in this convention who had thought out carefully the method by which the proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861 to be assumed by the new State should be ascertained had either forgotten or abandoned, ninety days later, the method prescribed in the Ordinance, as to the manner in which it should be ascertained. The constitutional provision was silent as to method. There was no occasion for repeating in it the language of the Ordinance so recently adopted.

Virginia vs. West Virginia (11 Wall., 39), decided in 1870, was a suit brought here by Virginia to have determined the true boundaries of the latter state with reference to whether three counties which, according to the contention of Virginia, were within her jurisdiction. This Ordinance was treated in that case by this Court as a compact between two States, not binding, of course, until it had been ratified.

The Court said at page 59:

> "But did Congress consent to this agreement?
>
> "Unless it can be shown that the consent of Congress under that clause of the Constitution which forbids agreements between States without it, can only be given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement."
>
> *Virginia vs. Tennessee*, 148 U. S., 503.
> *Wedding vs. Meyler*, 192 U. S., 582.

The court was referring there to the agreement so far as it related to the three counties.

It certainly was a compact, and wherever it was not carried into the Constitution, it remains binding as such. There can be no doubt that if the Constitution had been silent on the subject of the assumption of a proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, our friends on the other side would have been here claiming that the Ordinance was both as to assumption and method a compact, and we do not perceive how West Virginia could have answered that claim. It might not be a binding compact until acted upon in some way by Congress, but if acted upon by Congress in the admission of the State, it would be binding *ex relatione* as a compact from the beginning. Its validity as a compact could not be attacked, because in our view its validity does not depend upon that provision of Section 10 of Article I. of the United States Constitution which provides:

> "No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a Foreign Power or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

The predicate of this provision is that there shall be "another State." When this ordinance was enacted there was but one State, and that was the Commonwealth of Virginia. The validity of this compact is traceable to, and well supported by, that provision of the Constitution, Section 3 of Article IV.:

> "New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress."

When the Congress admitted West Virginia into the Union, there were two States, and the Ordinance so far as it was not merged into the Constitution, was a compact binding from the beginning.

If the method prescribed by section 9 of the Ordinance for the ascertainment of the proportion of the debt which the new State should assume, had produced a result satisfactory to Virginia, and the Constitution had contented itself with enjoining upon the legislature to provide for the ascertainment and payment of the debt to be assumed by the new State, our friends would have been here contending that the method prescribed by the Ordinance, not being in conflict with the Constitution, was a compact binding upon West Virginia, and how could that contention have been successfully answered?

The cirumstances under which the framers of this Ordinance drew it and adopted it, the purposes to be accomplished by it, the fact so often referred to by the learned counsel of the bond-holding creditors, that the men who drafted and adopted it were West Virginians, whose homes would be in the new State, whose association has always been with the people and with the territory which were to constitute the new State, and who resented, and had long resented what they had long deemed unjust and oppressive treatment by the government of the Commonwealth of Virginia, all this is to be kept in mind.

7. The Vice in the Argument for Virginia.

The vice in the argument for Virginia is in the assumption that the Ordinance is to be read as if it consisted only of these words:

> "The new State shall take upon itself a just proporportion of the public debt of Virginia prior to the first of January, 1861."

If the word "equitable" had been used instead of the word "just" in the first clause of the Ordinance, then, applying the method prescribed, the result must have been the same.

Section 9 of the Ordinance is to be construed as a whole; and it can mean but one thing, and that is an agreement that whatever sum shall result from an accounting, in accordance with the method specifically prescribed by the Ordinance shall constitute the just proportion of the debt which the State of West Virginia should take upon herself.

It is perfectly apparent that the Ordinance was not confined to the debt. Even the first item is not limited to expenditures in the creation of internal improvements within the limits of the new State, although it is well known that it was an internal improvement debt. It says:

> "The new State shall take upon itself a just proportion of the 'public debt,' etc., 'to be ascertained by charging to it all State expenditures within the limits thereof."

This is not limited in scope to internal improvement expenditures within her limits. First, whatever money the Commonwealth has expended in the territory in the construction of public buildings, or the improvement of public buildings, it was clearly intended should be included. Every expenditure made by Virginia within the territory of the proposed new State, which could be localized there, was to be included. Second, There was to be charged to her a just proportion of the ordinary expenses of the State government since any part of said debt was contracted.

It will be borne in mind, as has before been shown, that the Trans-Alleghany people had, for a great many years, complained publicly, in constitutional conventions, in the Legislature and elsewhere, that a larger burden of taxation had been imposed upon the people living in the territory of the proposed new State than was just, from any standpoint. That Virginia had denied proper representation in the Legislature to the people of the western portion of the State. That she had, while taxing them in a searching way, refused proper representation to the people of the western portion of the State, taxing them in the way of taxes on personal property, even including the interest on her own obligations, taxes on watches and plate, on carriages, and a long list of personal property; taxes on occupations and excises and taxes of every imaginable description; that she had exempted from taxation slaves under twelve years of age, unless hired to work under certain circumstances, and had taxed all slaves of greater age than twelve years, at the rate of one dollar and twenty cents per slave, regardless, utterly, of the value of both classes—those under twelve

years of age and those over twelve years of age—thus practically exempting, for the benefit of a class of property owners in the eastern portion of the State not less than $300,000,000 of marketable property; thereby casting an additional and oppressive burden upon the mountainous portion of the State, where there were, relatively, few slaves, and where the people were opposed to the institution of slavery. Those men, rightly or wrongly, considered that was the "parting of the ways" with the eastern portion of the State and her people, and that would "even up" on a just basis. They remembered that during the years from 1823 to 1861, the debt period, not a single public building had been constructed within the limits of the proposed new State; and that of the $33,000,000 of indebtedness incurred for internal improvements, only $2,800,000, at the uttermost, had been expended within her limits. And during all that time, the people felt that they had been over-taxed for the purpose of paying interest on an immense bonded debt, a trifle only of the proceeds of which had been expended within her territory, and that they had borne a larger than a just proportion of the ordinary expenses of the State government. It was, for this reason, manifestly, that there was inserted in that Ordinance, as to be charged to West Virginia "a just proportion of the ordinary expenses of the State government," "since any part of said debt was contracted." And it was for this reason that, after charging both of the items to the new State, the Ordinance provided for deducting from that total, "the moneys paid into the Treasury of the Commonwealth from the counties included within the said new State during the same period."

It is said that this was an artificial and arbitrary method. That depends upon the point of view. We must take the standpoint of the men who drafted and adopted this Ordinance. If the Ordinance had used the word "equitable" instead of the word "just" before the word "proportion", in the first line, and had left the remainder as it stands, could the result have been any different?

The definitive words, "to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of the said debt was contracted; and deducting therefrom the moneys paid into the Treasury of the Common-

wealth from the counties included within the said new State during the same period," would have remained, and the result must have been precisely the same by the pursuit of the same method.

To construe this Ordinance by disregarding the method prescribed in it, in order to reach a result which Virginia deems equitable, or which the Court may think ought to have been prescribed, is not to "construe" the Ordinance; but is to make a new and different Ordinance.

The members of the Legislature of 1871, presumably, knew what this Ordinance was when they embodied it in their Funding Act. Is it to be supposed that the men who framed the Ordinance, and so carefully outlined the method to be pursued, had, within 90 days, in the Constitutional Convention, abandoned that method, and had intended to assume a different proportion of the debt from that assumed by the Ordinance? Counsel would have the Court take an extraordinary liberty in construing the Ordinance.

They say, on page 11 of their notes:

> "That Ordinance purported to be an enactment of Virginia alone. It prescribed, *upon its face*, an arbitrary and what would seem to be an inequitable basis of settlement. In so far as it provided for the assumption by the new State of a "just proportion" of the debt of the Commonwealth, its language was free from objection. But, when it came to indicate the manner in which that proportion should be ascertained, its terms were not only artificial but, *on their face*, inequitable."

That is a matter of opinion, and, although that is the opinion of the learned counsel and of the bond-holding creditors and their counsel, that is not the question before the Court. The question is, "what was intended by the framers of the Ordinance?"

8. "Just" and "Equitable" are Synonymous.

We say again that there is no conflict between the Ordinance and Section 8 of Article VIII. Where the latter covers the same ground as the former, there is but one change,

which, in the excitement of that day, is easily accounted for, if it requires explanation; and that is the substitution of the word "equitable" for the word "just" in the Ordinance. What is the difference in common parlance between the word "equitable" and the word "just"? Webster defines "equitable" as follows:

> "Possessing or exhibiting equity; according to natural right or natural justice; marked by a due consideration for what is fair; unbiased; impartial; just; as an *equitable* decision, an equitable distribution," etc.

The first word he gives as a synonym is "just," followed by:

> "Fair, reasonable, right, honest, impartial, candid, upright."

He defines "just":

> "That which was fitting; conforming or conformable to rectitude or justice; not doing wrong to anyone; violating no right or obligation; upright; righteous; honest; true;—said both of persons and things.
>
> "3. Rendering or disposed to render to each one his due; equitable; fair; impartial, as a just duty."

He gives as synonyms of "just":

> "Equitable, honest, upright, true, fair, impartial, proper," etc.

Soule gives as the synonyms of "just":

> "1. Equitable, right, rightful, lawful, reasonable.
>
> "2. Fair, fair-minded, candid, even-handed.
>
> "3. Honest, upright, righteous, blameless, pure, conscientious, uncorrupted, virtuous, good, straight-forward."

As the synonyms of "equity," he gives:

> "1. Justice, right.

> "2. Justice, rectitude, uprightness, righteousness, impartiality, fairness, reasonableness, fair play."

But it seems impossible, for a moment, to consider that the use of the word "equitable" in the Constitution operated to obliterate the method prescribed by the Ordinance, when, if the word "equitable" had been in the Ordinance instead of the word "just," the result would have been precisely the same.

9. If the Ordinance is in Conflict with the Constitution the Ordinance Must Be Wholly Eliminated.

We take it to be clear that if the Ordinance is to be ignored as the method prescribed for ascertaining the proportion of the debt of the Commonwealth, it must be because it conflicts with Section 8 of Article VIII. of the Constitution. And if it does so conflict, it is eliminated as an entirety from this case, and is neither to be treated as a compact, nor, so far as the method it prescribes is concerned, to be considered at all. It cannot be partly in and partly out of the case; in, so far as it meets Virginia's notion of what it ought to be, and out, so far as it comes within her condemnation. It must either be the basis upon which the amount is to be ascertained, or entirely discarded for that purpose.

10. With the Ordinance Eliminated the Ascertainment of West Virginia's Proportion of the Debt Must be Left to the Legislature of Virginia.

If the ordinance is discarded, the case rests, so far as the liability is concerned, entirely upon Section 8 of Article VIII. of the Constitution. As we have said, this article is entirely without provision as to the rule which shall govern in ascertaining the equitable proportion. One thing only is explicit in Section 8 of Article VIII., and that is the command to the Legislature found in the words:

> "And the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquida-

tion thereof by a Sinking Fund sufficient to pay the accruing interest and redeem the principal, within thirty-four years."

Here we have the action of the Virginia Legislature consenting to and requesting, by Legislative Act, the admission of the State into the Union under the provisions of its Constitution. On the theory of the Ordinance being eliminated, this is clearly a compact to the effect that the proportion of the public debt which the new State shall bear is to be ascertained by her Legislature. This commits entirely to the Legislature the ascertainment of the equitable proportion of the debt which the new State shall bear, and enjoins upon it the necessity of using in the discharge of that duty all practicable speed. *Ex necessitate rei*, this not only gives to the Legislature the power, but imposes upon it the duty, of choosing the method by which the equitable proportion shall be ascertained, and its action in that respect would not be subject to judicial review. This made of it a legislative question. It left it to the sense of justice of the tribunal which the Constitution selected for its ascertainment. The Legislature might ascertain it through a joint committee of the two houses, or it might provide for the appointment of a commission, instructing it as to the basis upon and a method by which it should be ascertained and reported to that body. It is urged against this view that it never could have been intended that the debtor State (if it should turn out on the accounting to be a debtor State), should be left to determine the proportion which it should assume. It is a sufficient answer to this to say that it was plainly and unmistakably done. The Legislature was placed in the position sustained by the Legislature of a State as to the selection of the method of ascertaining and prescribing the proportion of the debt of a county or town which is divided. And in such cases the courts have held, including this court, that the question, "What proportion of the debt of a county or a city or a town which is divided by Legislative authority, shall be borne by the portion set off to make a new town, or included within the boundaries of another county, city or town" is a legislative question and not a judicial one. Commissioners of Laramie Co. vs. Commissioners

of Albany Co., 92 U. S., 307; Mount Pleasant vs. Beckwith, 100 U. S., 514. If the Legislature of West Virginia has failed with or without justification, to discharge its duty imposed upon it by the Constitution, what is the remedy? It has not yet been decided that any court can mandamus a Legislature to pass a law, or can restrain it in the exercise of its functions. It cannot enjoin it from passing an unconstitutional measure, albeit it may overturn the measure after it shall have been passed. Whether the Legislature of West Virginia is to be justly reproached for not having acted, is a question that will be considered later. And if the Legislature had proceeded to the ascertainment of the amount of the debt—the just proportion which should be assumed by West Virginia—either by its own committees or by a commission, could the court overturn its ascertainment upon the ground that it had not adopted the proper basis or method as between population, area or assessed valuation? When the power is unqualifiedly committed by a constitutional provision to the Legislature, can any court control the exercise of that discretion as to the selection of the method by which the proportion of the public debt which the new State shall assume is to be determined? When the Legislature in the exercise of its power and discretion shall have ascertained what it regards as an equitable proportion of the debt, can any court overturn that determination because in its opinion the proper method was not pursued, and the result does not in *its* opinion constitute an equitable proportion? The plain truth seems to be that the matter—the Ordinance being out of the case—was left by the Legislature of Virginia and by the Congress to the honor of the Legislature of West Virginia. This is nothing new in our system. Since the adoption of Article XI. of the Constitution:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State,"

no State can be sued, even in this court or in any other Federal Court, by citizens of another State or by citizens or

subjects of any foreign State. Whether suit may be brought in a State Court by an individual against the State in one of her own courts depends upon her own consent, as evidenced by her own laws. So that every citizen of the United States and every subject of a foreign State who buys a bond of a State, takes it with full notice and knowledge that the payment thereof and of the interest thereon rests, in the last analysis, upon the honor of the State whose obligation it is.

11. With the Ordinance Eliminated is the Matter Justiciable?

The case of County of Tulare vs. County of Kings, 117 Cal., 195, throws light upon this question.

Section 3 of Article II of the Constitution of California is as follows:

> "Every county which shall be enlarged or created from territory taken from another county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken."

The County of Kings, in the State of California, was created wholly out of Tulare County, and was fully established May 29, 1893. It was contended that on that date there were outstanding $22,000 of court house and $5,000 of road bonds, and that the plaintiff county, Tulare, between May 29, 1893, and September 18, 1895, had paid, on account of said bonds, $14,472.46; that on the assessment rolls of the two counties, as the basis of apportionment, the amount due from defendant was $4,615.22, which, with interest due, would make $5,049.61, due October 11, 1895; that this claim had been presented, etc., to the Supervisors of Kings County and rejected, when action was brought against Kings County to recover the sum. A demurrer being sustained, the case was taken to the Supreme Court.

The contention in the Supreme Court was that the defendant was liable under the Constitution.

The Court said:

> "The contention of plaintiff is that by the supreme law of the state it has been declared that the new county

shall pay a *just proportion* of the debts of the old county and it is left with the courts to determine what that *just proportion* may be in a case presented. In other words, it is denied that the legislature has any power to apportion the indebtedness, but that this question as to how much this just proportion will amount to is purely judicial.

"On the other hand, defendant contends that the sole question is whether the action will lie against defendant, the legislature having failed to provide in the act creating Kings county for the apportionment of the public property and debts of the county of Tulare."

The Court held, on the strength of a prior decision, that the constitutional provision was a restriction upon the power of the legislature to divide a county, and that the power still remained with the legislature to divide counties and that where a county was divided by the legislature without any provision as to the apportionment of the debt the presumption was that the legislature thought no apportionment was required.

The Court added:

"It would seem to me, if the courts should undertake to determine this question upon the authority of the constitution alone, they would have neither compass nor rudder by which to be guided."

The case was ruled largely by the opinion of the Supreme Court in *Los Angeles County vs. Orange County*, 97 Cal., 329, of which decision the opinion says:

"The learned justice, in delivering the opinion of the court, called attention to the established rule that where no provision is made by the legislature as to the debts of the old county they remain with the old county. He then takes up the constitutional provision in question, and says: 'The mode of determining the 'just proportion' of the debts and liabilities for which the new county shall be liable, is not prescribed in the constitution, *but is left to the determination of the legislature in each particular case*';

he points out that the legislature did provide a mode of ascertaining the 'just proportion' of the debts by the appointment of commissioners, and limited the liabilities to those existing at the time the act took effect, and he says: 'As the legislature could divide the public property and assets of the county in such mode as it might choose, it was competent for it to fix upon a date, which it might select, as the time for ascertaining their amount and value, *as well as determining in connection therewith the 'just proportion' of the debts and liabilities to be assumed by the new county. In the present instance the legislature fixed the time when the act took effect as the proper period for ascertaining the amount of these assets and liabilities, and it cannot be held that the constitutional provision was violated in selecting that as the point of time at which to properly determine what would be a 'just proportion' of the debts and liabilities to be assumed by the new county.*' The expenditures for which the claim was made were incurred in the new county prior to its organization, but after the date of the act, and the commissioners had reported these separately, with the remark, 'that as a matter of equity the amount should be refunded by Orange county to Los Angeles county.' The opinion upon this point continues: 'The Legislature may have considered that it would be necessary for the county of Los Angeles to expend the money for municipal purposes within this territory; *and as it was within its discretion to determine that it should bear the burden of any of the expenditures which it might thus make, the fact that it has made no provision for its reimbursement is indicative that it was not its intention that it should be reimbursed therefor.*'

"Now, this was just such a claim as counsel for plaintiff insists must be heard and determined by the judicial arm of the government, and that over it the legislature has no jurisdiction or power whatever. It seems to me the decision necessarily settles the very question here—that it is a legislative and not a judicial function. Upon plaintiff's theory it was the duty of the court to overrule the demurrer and proceed to hear

> and determine what the 'just proportion' of the debt of Los Angeles county was that should be borne by Orange county; but the court found no cause of action stated, because the legislature had disposed of it, and because it was a legislative function and not a judicial one. (See, also, *County of Orange vs. Los Angeles County*, 114 Cal., 390.)"
>
> *County of Tulare vs. County of Kings*, 117 Cal., 195.

If the liability of West Virginia is to be determined under Section 8 of Article VIII. of her Constitution, without reference to the Ordinance, then the grounds for holding that the Legislature of West Virginia is the only tribunal which can ascertain the amount of her liability are much stronger than those upon which the California Court, in the case just cited, decided that it had no jurisdiction; since the Constitution of West Virginia expressly provides that the Legislature shall ascertain the equitable proportion of the debt to be assumed. The California Constitution contained no provision of this character.

We recognize, of course, the fact that the power of the legislature to apportion the indebtedness of counties exists in case of division, as an incident to their power to divide such municipalities. These are public corporations, created for political purposes, and they have no contract rights to continued existence. They are subject, at all times, to legislative change. But the power which the legislature has to create them, and divide them, and, therefore, the incidental power to apportion their liabilities, while it proceeds from the power to create them, is no more direct and unlimited than the power with which the Constitution of West Virginia clothed the Legislature of that State, in respect of the method of ascertainment, and otherwise, of the proportion of the public debt which would constitute an equitable share for West Virginia to pay.

The question is not whether it was wise for the Legislature of Virginia to consent to the admission of the State of West Virgina, under Section 8 of Article VIII. of her Constitution, vesting such a power in her Legislature. The question is, did they do it? The ascertainment is, certainly, in its nature, a legislative function. In the exercise of its legislative powers, the

Legislature may provide for examination. It must, ultimately, pass upon the result. It may have it done on several bases or theories ; but it must, in the end select ths basis, for it must provide for the payment.

The constitutional provision, without the Ordinance as a guide as to method, seems to submit to the Court a question which is not judicial in its nature. The case in that respect, as well as others, is unique. It does not differ much, in the aspect of it which we are now considering, from the case of Taylor vs. Brewer *et al.*, 1 Maule & Selwin, 290, and Cummer vs. Butts, 40 Mich., 322.

In the former case Plaintiff founded an action of assumpsit on an agreement by defendant that any service by plaintiff should be taken into consideration, and such remuneration be made as should be deemed right.

The Court refused to set aside a non-suit.

Lord ELLENBUROUGH, C. J., said : "Here, I own, it struck me, was an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labor deserved anything he should be recompensed for it by the defendants."

GRAVE, J., said : "I consider the resolution to import that the committee were to judge whether any or what recompense was right."

LE BLANC, J., said : "It seems to me to be merely an engagement of honor."

BAGLEY, J., said : "The fair meaning of the resolution is this, that it was to be in the breast of the Committee whether he was to have anything, then how much."

Cummer vs. Butts arose on a contract for the sale of lumber which stipulated that either party might cancel the contract "for good cause."

One of the parties terminated the contract, whereupon the other party, who insisted that no good cause for cancellation existed, brought suit.

Judge GRAVES said : "The difficulty is inherent. It exists in the terms adopted by the parties. The requirement of good cause as something on which the right to revoke by one or the other should depend, is, as here introduced, too vague to be fairly intelligible. It is manifestly applied to each party, but the phrase 'good cause' in such connection, as to parties and subject matter, has no such distinct sense as to

furnish a common and intelligible criterion for the parties, or any determinate sense whatever. It is impossible to say that the wills of the parties concurred and that each meant exactly what the other did, or even to say what either meant. The room for difference of opinion is immense, and the case is one where the parties have failed to express themselves in terms capable of being reduced to lawful certainty by judicial effort."

12. THIS COURT HAS DECLARED THAT THE ORDINANCE AND THE CONSTITUTION DO NOT CONFLICT AND ARE TO BE READ IN PARI MATERIA.

When this case was argued here on demurrer, counsel for defendant contended that the Court did not have jurisdiction to determine the principle upon which West Virginia should be made liable for any portion of the old debt of Virginia because this was a matter which the Constitution of West Virginia had referred to her Legislature. Hence, it was argued, the consent of Virginia to the admission of West Virginia into the Union, under the provisions of that Constitution, and the action by Congress admitting the new State, constituted a compact between Virginia and West Virginia, which operated to commit to the Legislature of the latter State the ascertainment of what would be a just and equitable proportion of the debt to be assumed, including the basis and method upon and by which it should be ascertained. The Court in reply to this argument resorted to the Ordinance which prescribes the method of ascertainment and thereby defines the proportion which should be assumed. The Court said, through the Chief Justice (206 U. S., 290, 319):

> "It is, however, further insisted that this Court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of Congress, by which the question of the liability of West Virginia to Virginia was submitted to the arbitrament and award of the Legislature of West Virginia as the sole tribunal which could pass upon it. As we have seen, the Constitution of West Virginia, when admitted into the Union contained the provision: 'An equitable proportion of the public debt of the Com-

monwealth of Virginia prior to the first day of January, one thousand eight hundred and sixty-one, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation of the same by a sinking fund and redeem the principal within thirty-four years.' And it is said that, on May 13, 1862, the Legislature of Virginia passed an act entitled 'An act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State,' by which consent was given to the creation of the proposed new State, 'according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861;' and that by the act of Congress, the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two States. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided 'for the formation of a new State out of the territory of this State,' and declared therein that 'the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861', to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should 'ascertain the same as soon as practicable', it *referred to the method of ascertainment* (italics not the court's) prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression that the 'legislature shall ascertain' was that the Legislature should ascertain as soon as practicable the result of the pursuit of the

method prescribed, and provide for the liquidation of the amount so ascertained."

While nothing has been settled in this case except the question of jurisdiction, it is quite difficult to conceive upon what principle Section 8 of Article VIII. of the Constitution can be read without reference to Section 9 of the Ordinance; and there is no point in reading it in connection with Section 9 of the ordinance except that the Ordinance furnishes, and nowhere else is it to be found, the intention of its framers as to the method which should be pursued in ascertaining the result which would constitute the just or equitable proportion intended to be assumed. Reading the Ordinance *in pari materia*, with Section 8 of Article VIII. of the Constitution, incorporates into that provision of the Constitution all of Section 9 of the Ordinance relating to the method prescribed for the ascertainment of the proportion of the debt which the new State was to assume.

PART FOURTH.

Exceptions to the Master's Report.

Pursuant to the interlocutory decree, there has been an accounting before the Master on the basis of the ordinance, and, alternatively, on the other *bases* indicated by the decree. A large number of exceptions have been filed, by both parties, to the findings of the Master. Most of these exceptions have been fully argued in Part II. of Defendant's Brief. It is admitted that the amount of the public debt, on January 1, 1861, was $32,919,863.93; nor is there any dispute that this debt was incurred for works of internal improvement, as alleged in the bill, and admitted in the answer.

1. The Master Was Right in Holding That Bonds Held by the Sinking Fund and by the Literary Fund Were Not a Part of the Public Debt of Virginia.

The only difference that arose under Paragraph II. of the Decree between the complainant and defendant is whether the

bonds of the Commonwealth held by the Sinking Fund of $1,369,243.92, and by the Literary Fund, $1,116,843.35, with accrued interest amounting to $15,895, are part of the debt.

As to the latter, after investigation by counsel for the complainant, it was conceded that the bonds were in possession of the Board of Public Works for sale; but have never been disposed of, and were, therefore, not a part of the public debt. As to the other two items, the Master held that the bonds were the property of Virginia, and were no part of the public debt on January 1, 1861. This question is elaborately discussed by the Master in his report.

We are content to rest the question whether the bonds in the Literary Fund and the Sinking Fund were part of the public debt of the Commonwealth of Virginia, on January 1, 1861, upon the reasoning and citations of the Master, calling attention only to one or two authorities which are not cited by him.

In *Board of Public Works, etc., vs. Gannt*, 76 Va., 465, the court said:

> "The bills are against the board of public works and the board of education. Although the persons composing those boards are made parties, in their individual character, no relief is asked against them as such, and it is obvious that as individuals they have no sort of concern or interest in the question. The acts complained of are acts of the legislature, and the relief sought is against corporations composed exclusively of officers of the State. The bill is precisely such as it would have been if the appellees were proceeding against the State.
>
> "*Conceding that the fund in controversy is subject to a pledge on behalf of the public creditors, it is still the property of the State as absolutely as any of the money in her treasury, or the capitol square and public buildings.*
>
> "It is none the less in her possession because it is under the control of the board of education, for that board is a mere agency of the State, having no existence or power independently of the State. As was said by Judge ANDERSON in *Clarke v. Tyler*, 30 Gratt., 159: 'After money is set apart as a literary fund, the com-

> monwealth is still the sole owner of it, as she is of all the funds and property of the board of education and the other corporations, which are composed of officers of the government, the funds and property of which are the sole property of the Commonwealth.' "

It would seem to be clear that the property of Virginia could not very well be a part of the public debt of Virginia. Such bonds are not outstanding obligations of the State. When the bonds were purchased by the State, the debt was *pro tanto* discharged, and the bonds were then no more the obligations of the State than if they had never been negotiated.

At the foot of the opinion is the following:

> " NOTE BY JUDGE STAPLES.—'Since the foregoing opinion was delivered, the decision of the supreme court of the United States in the case of *John Elliott and als. v. The Governor, Lieutenant-Governor, Auditor, and other State officers of Louisiana*, has been rendered. The reasoning in that case sustains fully the views presented in my opinion.' "

(The case to which Judge STAPLES refers is reported under the title of " *Louisiana v. Jumel* " aad " *Elliott v. Wiltz*," 107 U. S., 711.)

2. THE MASTER WAS RIGHT IN EXCLUDING UNDER PARAGRAPH III. OF THE DECREE EXPENDITURES BY CORPORATIONS IN WHICH VIRGINIA WAS A STOCKHOLDER.

Paragraph III. of the Decree required the Master to ascertain and report:

> " All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia, since any part of the debt was contracted."

We agree with the Master that the paragraph was based upon that portion of the Wheeling Ordinance which reads:

> " The new State shall take upon itself a just pro-

> portion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it *all State expenditures within the limits thereof.*"

We do not agree that the discussion by the Master of the question which arose under this paragraph, as to the doctrine of "equitable construction," was at all warranted by any question which arose, or could arise, under the Third Paragraph, and insist that the question is one of law, which the court did not commit to the Master. The sole question under that paragraph, committed to the Master, was to ascertain and report:

> "All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

(*a*) The Master's Finding.

The complainant claimed that $5,639,302.66 had been expended by the State within the designated territory (Record, p. 371, c. 1, p. 1).

The amount conceded by the defendant was $1,251,288.92.

The question as to the items 2, 3, 10, 11, 12, 13, 14, 25, 28, 35, 55, 150, have been fully argued in another portion of the brief.

The Master allowed, to which the defendant excepted, in addition to the conceded sum, $1,560,271.06, making $2,811,-559.68, rejecting claims insisted upon under this paragraph by the complainant, amounting to $2,827,742.68.

(*b*) The Rejected Claims Represented Expenditures by Private Corporations.

The claims rejected represented the expenditures within the State of West Virginia, except as hereinafter stated, by private corporations created by Virginia by special Act, which possessed under her general laws all the faculties of a corporation, including perpetuity, the right to

have a common seal, to be managed by a Board of Directors, to issue stock, to the stock of which corporations Virginia had subscribed through her Board of Public Works duly thereunto authorized by law in conjunction with solvent citizens, either two-fifths or three-fifths, as the special Act provided. The Master was clearly right in excluding these as State expenditures within the territory of West Virginia. The money paid in by the State and other stockholders to the treasury of the corporation on their respective subscriptions became the property of the corporation. For such payments the stockholders each received stock representing his interest in the company's property. The distinction between the stockholder and the corporation is too well settled to require argument. The improvements made through the expenditure of the moneys thus paid into the treasury of the corporation was its property. This property did not belong to the State, nor did it belong to the stockholders. The State in subscribing to the stock carried none of its sovereignty into that relation. It stood before the law in respect of ownership and control precisely as individuals or private stockholders stood. This has been long settled by the decisions of this Court.

(c) Virginia Legislature and Courts Recognize the Distinction between Private Corporations with Stock and Public Corporations without Stock.

The Virginia Legislation recognizes the distinction between private corporations and public corporations. In several instances the Legislature created public corporations composed of the Governor, the Attorney General, and some other official of the State, through which to construct works of public improvement. These corporations had no stock. The corporations were simply the agents of the State, each without stock; their property was the property of the State. The Supreme Court of Appeals of Virginia held that such a corporation was not liable for damages caused in the construction of an improvement, or in its management.

Sayre vs. The Northwestern Turnpike Road, 10 Leigh, 454.

These private corporations, on the other hand, in which the State had taken stock in conjunction with others, were, in respect of suits, subject to the same laws as other private corporations throughout the State, to which the State sustained no relation whatever except as a sovereign. In the case of *James River, &c., vs. Early*, 13 Grattan, 541, cited by the Master and in Part II. of this brief, which was an action to recover for the negligence of the corporation and in which the right to sue the corporation was raised, the Supreme Court of Appeals distinguished that corporation from the public corporation involved in the Sayre case.

We do not suggest that the primary motive of the State in subscribing to the stocks of such companies to secure the construction of highways, bridges and railways, and the improvement of rivers, and works of public convenience and benefit, was to make money. She borrowed the money to pay her stock subscriptions in almost every one of these cases. In each case, the loan was authorized by the Act of the Legislature which created the corporation. And in each case the evidences of debt, which were certificates of stock issued by the State, contained a reference to the particular Act under the authority of which the loan was made, and the Court will see in the schedule annexed to the Master's report opposite the name of each of these corporations the purpose for which the loan was created, giving the Act by date, and also the number of the loan, its maturity and amount. On principles of international law, upon the division of Virginia by the separation of the territory now constituting West Virginia, and her admission into the Union as a State, the public improvements, public buildings and other governmental property within West Virginia, would pass by the fact of separation to the new State ; and the latter would be obliged on principles of international law, as she took the property, to bear not a part, but the whole debt which had been incurred in its creation. It would be a debt running with the land, an obligation not secured by a mortgage upon the territory of the new State and localized in that way, but a debt *contracted with reference to, and for the benefit of, the territory embraced* in the new State. It would be manifestly impossible for the State of Virginia by any act of her own, or any agreement between her and the proposed new State, to convey to the latter

the property of the corporations in which she was a mere stockholder, for she would not have any property to convey except her stock; manifestly she could not transfer the private property of the corporation; nor could the interest of the private stockholders in the corporation be displaced by any agreement made by the Commonwealth in respect to it.

(d) VIRGINIA ACT OF 1863 TRANSFERRING TO WEST VIRGINIA PROPERTY WITHIN HER BOUNDARIES.

No change of the Government of the old State, or its territory, could change in the slightest the corporate ownership, or release it from its duties under its charter. It would be subject, perhaps, to a new master; and this was evidently Virginia's notion of it in '63. The Act of February 3, 1863, passed by the Restored Government, Chapter 15, Appendix to the Record, page 128, provides:

> "That all property, real, personal and mixed, owned by or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the State of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads and other internal improvements, or parts thereof, situated within the said boundaries, and now vested in this State, or in the President and Directors of the Board of Literary Fund, or the Board of Public Works therefor, or in any person or persons, for the use of this State to the extent of the interests and estate of this State; and shall also include the interest of this State, or of the said President or Directors, of the said Board of Public Works, in any *parent bank or branch* doing business *within the said boundaries;* and all *stocks of any other company or corporation,* the principal office or place of business whereof is located within the said boundaries standing in the name of this State or the said President or Directors, or of the said Board of Public Works, or of any person or persons, for the use of this State."

It was admitted on the record by the defendant that the principal office or place of business of any corporation whose works were wholly within the State of West Virginia, was within the State of West Virginia, and came within the provisions of the Act. Section 2, transferred unpaid and uncollected, arrearages of taxes on lands, lots, of all description, fines imposed by courts, forfeitures and penalties, &c., &c., dividends on stock owned by the State or by the Board of Public Works or the Literary Fund, in any bank, bridge or other corporation, and various other items which need not be mentioned. Section 5 provided that :

> " If the appropriations and transfers of property provided for by this Act take effect, the State of West Virginia *shall duly account for the same* in the settlement hereafter to be made by this State, provided that no such property, stocks and credits shall have been obtained since the re-organization of the State Government."

(*e*) The Transfers of Property Took Place.

That the transfers did take effect, is apparent from the legislation of West Virginia, put in the record by the complainant, and will be found in the appendix. If by that Act Virginia had transferred to West Virginia her interest in the property, and had provided simply for the transfer of the stocks or property of corporations in which her stock represented her interest, it might be thought that it was intended as a mere muniment of title ; but the provision that she shall *account for it hereafter in the settlement to be had between the two States gives to it conclusively a different aspect.* This Act is set out in Paragraph VIII. of the Bill.

> " And it is alleged that under its provisions the property which was appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted in the aggregate to several million of dollars, the exact amount your oratrix is

unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this Act, the State of West Virginia realized and received into her treasury from the sale thereof about $600,000; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861."

(*f*) West Virginia Cannot Equitably Be Charged Both With the Value of the State and with the Expenditures Made by the Corporations.

And the Master finds that the amount due Virginia on account of the stock of the Northwestern Bank of Virginia and of the Fairmont Bank is $477,250; and he also adds $7,578, stock of the Sweet & Salt Sulphur Spring Company; $4,000, stock of the White & Salt Sulphur Spring Company; $12,000 for stock of the Fairmont & Palatine Bridge Company, making in all $500,828. No evidence was offered, upon which he could find, nor does he find, the value of the other stocks at the time of the transfer under the Act of 1863 to the defendant. It is admitted that they were of no value. Before that date the property of such corporations had to a considerable extent been destroyed by the troops of Virginia acting in co-operation with the Confederate States, stocks of the bridge companies and the turnpike companies. If there had been evidence upon the part of the plaintiff that the stock other than bank stocks, in other words, the stocks of the private corporations created to build bridges, turnpikes, and other works of internal improvement, whose principal place of business was in 1863 in the territory of West Virginia were worth par when transferred, he would have been obliged to find in favor of West Virginia for all the stocks at par. That it is confessed on the record that they were worthless at the time they were transferred does not change in the slightest the status or the principle. Upon this basis, it is perfectly apparent that it was the understanding of the Legislature that the expenditures by these companies of their money within West Virginia could not be considered State expenditures; otherwise, if West Virginia were obliged to pay for them as *State expendi-*

tures and also to pay for the *stock*, the defendant would be subjected to double payment for the same thing, which, of course, never could have been intended. It is thus apparent that not only was the Master right, as a matter of law, in rejecting under Paragraph 2 expenditures by these corporations as State expenditures, but that this could not have been the understanding of Virginia, as shown by the Act of 1863. And it will not escape attention that the Act of 1863 in respect of all the items embraced in it, stocks and improvements, localized them, just as the ordinance localizes expenditures. The Act of 1863 was based upon territorial limits. It can hardly be possible that West Virginia *could equitably be held responsible* for these stocks under the Act of 1863 at par if they *were worth par*, and also be responsible for all, or a part, of the moneys which Virginia had *borrowed with which to purchase them.* That would be unique for want of equity :

(*g*) Counsel for Virginia Beg the Question.

Counsel for Virginia on page 21 of their Notes of Argument say :

> " In considering the questions which are presented by the controverted items in the schedules filed under this paragraph it is important always to bear in mind the precise language of the decree which, following the terms of the Wheeling Ordinance, directs the ascertainment of :
>
> ' ALL *expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.'
>
> " It is manifest that that language in explicit and comprehensive terms embraces without exception or qualification, all expenditures of whatever character or description, and on whatever account, or for whatever purpose, or in whatever manner made, which were made by the Commonwealth of Virginia in any part of the territory now constituting West Virginia, after March 19, 1823, the agreed time at which any part of the debt in question was contracted."

This is *petitio principii*. The question is whether an expenditure by Virginia in the purchase of stock of a corporation, which corporation is authorized to construct a work of internal improvement within the territory of what is now West Virginia, is an expenditure "*made by Virginia in West Virginia*" in contradistinction to an expenditure *made in West Virginia by a corporation in which Virginia is a stockholder*. The learned counsel have emphasized the capital letters and italics in the wrong place. The point is not there; the capitals and the italics, both, should be transferred from the words "*all expenditures*" to the words "*made by the Commonwealth of Virginia.*"

3. The Master was Wrong in Finding that Interest on the Public Debt of Virginia was Part of the Ordinary Expenses of the State Government.

If the State chooses to create corporations, and invest in their capital stocks, for the making of internal improvements, and borrows the money for the purpose of paying her stock-subscriptions, while she does it upon her credit as a sovereign, the use to which she devotes the money is not a *governmental* use; but is a commercial use.

While the debt, as between the bondholders and the State, is the debt of a sovereign State, the property acquired is an investment. It is, in no sense, governmental. It is commercial. And to say that the interest annually accruing upon such a debt is an ordinary expense of State government, seems to be absurd. To say that it is even an ordinary expense of a State, as a sovereignty, is not maintainable.

Is it conceivable that the framers of this Ordinance could ever have been induced to agree to the proposition, or have contemplated, that by its provisions they were binding the new State to pay, under the guise of ordinary expenses, nearly $4,000,000 of interest on the moneys borrowed by Virginia to invest in capital stocks of corporations, which, on the separation, she was to keep, and did keep, as well as all of the internal improvements which that stock represented?

The Master finds the ordinary expenses of the State Government of Virginia, during the debt period; that is to say, from March 19, 1823, to January 1, 1861, to have been $40,-

274,896.70, including interest on the public debt during that period, amounting to $18,574,747.84, leaving as the sum for ordinary expenses of the State government, excluding interest, $21,700,148.86, of which he assigns to West Virginia $4,161,352.99. This ascertainment and apportionment was excepted to by the defendant. He also assigns to the defendant, $3,986,102.93, as its proportion of the interest paid on the public debt during the debt period, which he includes as a part of the ordinary expenses of the State Government. To this, the defendant excepts.

(a) THE LANGUAGE OF THE ORDINANCE.

Section 9 of the Wheeling Ordinance, in which the words to be construed occur, is as follows:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the *ordinary expenses of the State government*, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

(b) DEFENDANT'S CONTENTION.

The defendant contends that upon every principle of construction, by the plain meaning of the words "ordinary expenses of the State government," by the interpretation which results from reading Section 9 of the Ordinance as a whole, by the meaning which the words in question have acquired from common use in the constitutions and statutes of the different States as well as by the great preponderance of judicia interpretation in cases where these words have been construed interest on a public debt, especially where such a debt was incurred for extraordinary purposes, cannot propeily be included among the ordinary expenses of a State government.

(c) Interest on a State Debt Is Not an Ordinary Expense of Government Because it is Payable Only During a Limited Period.

The adjective "ordinary" fixes the character of the expenses of the government with which the Ordinance charges West Virginia. An ordinary expense of government is one which ordinarily recurs so long as government exists. It is obvious that interest on a State debt does not belong to this category. A State debt is a temporary obligation to be discharged at an agreed time by payment. The ordinary expenses of a State government, however, never cease. So long as the government exists, expenses for its support, for the maintenance of the legislative, judiciary and executive departments, for the performance of the various duties which they owe to the people will annually recur and must be met. Even if it were proper, as we do not think it is, to describe payments upon a bonded State debt as an expense of government, is it not too clear for argument, when we find that payments upon such a bonded debt are by the terms of the contract creating the debt only to continue during a specified limited time, while ordinary expenses of the government must continue indefinitely, that the term *ordinary* expenses must be applied exclusively to the latter class of expenses, and cannot be deemed to include the payments on the debt which are to cease after the expiration of the time fixed by the contract ?

(d) Interest on the Old Virginia Debt Was Not an Ordinary Expense of Government Because the Debt Was Incurred for Extraordinary Purposes.

In considering whether interest on a State debt is one of the ordinary expenses of a State government, it is important to bear in mind the purposes for which the debt was incurred. The debt of Virginia to which the Wheeling Ordinance refers, was incurred for internal improvements. The proceeds of the Virginia bonds were either directly applied in the construction of highways, railways, bridges and similar improvements, or to the purchase of stock in corporations which applied the money in the construction of such internal improvements. These improvements were of a per-

manent character, and in constructing them the State was making a permanent investment. We do not understand that there is any dispute that expenditures for works of internal improvement are extraordinary and not ordinary expenditures. The Master's report (page 112) states that "the question as to what is an extraordinary expense seems to be well settled," and the cases which he cites in illustration decide that expenditures for permanent improvements are extraordinary expenditures. All the authorities on this question are in agreement. A number of State constitutions prohibit the State from expending money on works of internal improvement. This shows the impossibility of regarding such an expense as an ordinary expense of government. If the principal of some of the Virginia bonds issued for internal improvements had fallen due within the period covered by the Ordinance and had been paid to the bondholders, is it not manifest that this payment for an extraordinary purpose, a payment which could be made only once, could not be deemed an ordinary expense? And if payment of the principal debt would not be an ordinary expense, on what theory can payment of the interest, which is merely incidental to the principal debt, be so regarded?

(e) The Fact That the Interest Was Payable at Regular Intervals Did Not Make it an Ordinary Expense

The only circumstance which gives any semblance of plausibility to the claim that interest on the Virginia debt was an ordinary expense of the State government is the fact that the interest was payable at regular intervals until the principal fell due and was paid. We have already pointed out that the annual recurrence of an interest charge during a *limited* period does not make the interest an *ordinary* expense. Suppose the State had made a contract for the construction of works of internal improvement, under which payment therefor was to be made in equal semi-annual instalments during a period of years. Would it be possible to claim that the payment of such instalments was an ordinary expense of government?

(f) INTEREST IS NOT PROPERLY DESCRIBED AS AN EXPENSE.

Leaving out of consideration the force of the adjective "ordinary," it would still be not in accordance with the common use of language to describe the payment of interest on a funded public debt as an *expense* of *government*. The difference between expense and debt in the common use of language is well expressed by Judge SPENCER in a Louisiana case as follows: "In common parlance there is, no doubt, a distinction in the meaning of the words debts and expenses. The latter is usually applied to those current temporary obligations which are met by payment as they arise, while the former designates obligations of a more enduring kind" (*State ex rel. vs. State Auditor*, 32 La. An., 89, 90).

A striking illustration of this distinction is found in the provisions of State constitutions relating to taxation and revenue. In most of the States the constitutional provisions concerning taxation and the appropriation of revenue expressly provide for the payment of the expenses of government, and *also* for the payment of the public debt and interest thereon. Clearly the men who framed these constitutions would not have provided separately for the payment of the principal and interest of the public debt, if they had supposed that such payment fell among the expenses of government for which they had already provided. We shall subsequently call the attention of the court to the specific coustitutional provisions to which we refer.

(g) THE DISTINCTION BETWEEN THE STATE AND THE GOVERNMENT OF THE STATE.

The Wheeling Ordinance expressly discriminates between the State and the government of the State. According to the ordinance, "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia." The public debt to be assumed is the debt of the Commonwealth of Virginia and not of its government; and the new *State*, not the *government* of the new State, is to take upon itself a just proportion thereof, which is to be ascertained "by charging to it all the *State* expenditures within the limits thereof and a just proportion of the ordinary expenses

of the State *government.*" All *State* expenditures within the defined area are to be charged and in addition a part of all the ordinary expenses of the State *government.* It is a cardinal principle of construction that effect must be given to every word in a written instrument. In the Ordinance no effect can be given to the word "government" unless it is construed as meaning something different from the word "State." If this is granted, then the conclusion follows that under the Ordinance payment of the public debt of Virginia, if it is to be regarded as an "expense," is an expense of the *State,* and not of the *government* of the State, because the Ordinance describes the public debt as the "debt of the Commonwealth of Virginia," that is to say, of the *State.* The State may have expenses which are not the expenses of the State government. If a State fails to pay interest on its bonds, its credit is affected, and it is an event to be deplored; but the government of the State must go on just the same. The distinction drawn by the Ordinance between the State and the government of the State is a real and not an artificial distinction which this court has recognized in *Texas vs. White, 7 Wall., 700,* and in *Poindexter vs. Greenhow, 114 U. S., 290.* In the former case Chief Justice CHASE delivered the opinion of the court, and in enumerating the various senses in which the word State is used said: "And there are instances in which the principal sense of the words seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government. In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion. In this clause a plain distinction is made between a State and a government of a State." We think the language of the Ordinance plainly shows that the words Commonwealth and State are therein used in the primary sense of a people or political community as distinguished from the government. Such an interpretation is in accordance with the actual fact. Under American institutions the government of a State has no validity except as representing the people who compose the State. When a public debt is contracted it is not the government, but the people, of the State who become liable for its payment. The government merely acts as the agent of the

people in the transaction. In the case of this debt of Virginia this is peculiarly true. The whole debt which is the subject of this suit was incurred for internal improvements, matters in which the people were interested, from which the people might anticipate benefits in the conduct of their trade and commerce, but which have no relation to the work of government. How can the payment of such a debt or of the interest thereon be regarded as an expense of government? Suppose a private individual entrusts the conduct of his affairs to an agent, who, in the course of his employment, executes a note on behalf of his principal. Would it not be doing violence to the ordinary sense in which language is understood to include payment of the note or of interest thereon among the expenses of the agent? In the case of business corporations, the word government is not used to describe the agents who conduct the business, but the work performed by them is commonly described by the word management, and the expenses of the management of a private corporation, in the largest sense, are called operating expenses. We submit that no instance can be found in the records of private corporations where the payment of interest on bonds of such a corporation is treated as an operating expense.

(h) Finance Provisions of State Constitutions Show that Interest on a State Debt Is Not Regarded as an Expense of Government.

The provisions of the State constitutions relating to taxation and revenue are helpful in considering the phrase "ordinary expenses of the State government." The constitutions show two things, (1) that the creation of a public debt is not an ordinary, but an extraordinary matter, and (2) that the phrases "expenses of the State" and "expenses of the State government" do not apply to the payment of interest on State bonds. Examination of the constitutions makes it plain that the founders of State governments intended that ordinary expenses should be defrayed out of funds raised by taxation, that the power of creating funded debts by the issue of bonds, if granted at all, should be exercised only for the purpose of meeting extraordinary emergencies, and that

such debts when created should be paid and extinguished at maturity, thus restoring the normal and ordinary condition of paying expenses as they arise by the imposition and collection of taxes. Nearly all the State constitutions carefully limit the power of the Legislature to issue bonds, and define the purposes for which this power may be exercised. In some States, as in Wisconsin, the constitution prohibits the State from contracting public debts except for the purpose of defraying extraordinary expenditures. Many of the constitutions also direct that the law authorizing the creation of a public debt shall provide for levying a special annual tax sufficient to pay the interest on the debt and to provide a sinking fund for the payment of the principal at maturity within a specified number of years. Furthermore, in many of the States the constitutions direct the Legislatures to raise revenues sufficient to defray the estimated expenses of the State or of the State government, and *also* a sufficient sum to pay the interest on the State debt. There could not be a clearer indication that interest on the State debt was not regarded as an *expense* of the State government. Had it been deemed such an expense there would have been no need of requiring the Legislature to raise revenue to pay interest on the State debt in addition to revenue for the purpose of defraying the expenses of the State government.

We shall now quote the specific provisions from the State constitutions to which we have made general reference. In many of these provisions the phrase used is substantially the same as that in the Wheeling Ordinance; namely, the ordinary, or the current, or the necessary, expenses of the State government, and these expenses are expressly distinguished from interest on the State debt. When we find that so many constitutions, drawn up by men who were under a peculiar obligation to use language accurately, agree in separating the ordinary expenses of the State government from interest on the State debt, the inference is compelling that this distinction is generally accepted, and that the men who framed the Wheeling Ordinance, in charging the new State with a just proportion of the ordinary expenses of the State government, did not intend to include interest on the public debt of Virginia among these expenses.

(i) EXTRACTS FROM STATE CONSTITUTIONS.

Alabama, Constitution of 1875, Article X, section 7, provides that the City of Mobile "may, until the 1st day of January, 1879, levy a tax not to exceed the rate of one per centum, and from and after that time a tax not to exceed three-fourths of one per centum to pay the *expenses of the City government*, and may *also*, until the 1st day of January, 1879, levy a tax not to exceed the rate of one per centum, and from and after that time a tax not to exceed three-fourths of one per centum to pay the *existing indebtedness* of said City and *the interest thereon*."

Alabama, Constitution of 1901, Article XI, paragraph 216, provides that the City of Mobile "may from and after the ratification of this Constitution levy a tax not to exceed the rate of three-fourths of one per centum to pay *the expenses of the City government*, and may also levy a tax not to exceed three-fourths of one per centum to pay *the debt* existing on the 6th day of December, 1875, *with interest thereon*, or any renewal of such debt."

Florida, Constitution of 1885 (in force at present), Article IX, section 2: "The Legislature shall provide for raising revenue sufficient to defray *the expenses of the State* for each fiscal year, and *also* a sufficient sum to pay *the principal and interest of the existing indebtedness of the State*."

Georgia, Constitution of 1877 (in force), Article VII, section 1: "The powers of taxation over the whole State shall be exercised by the General Assembly for the following purposes only: For the support of the State Government and the public institutions. * * * To pay the interest on the public debt. To pay the principal of the public debt."

Section 14, paragraph 1: "The General Assembly shall raise by taxation each year, in addition to the sum required to pay the public expenses *and* interest on the public debt, the sum of $100,000 which shall be held as a sinking fund to pay off and retire the bonds of the State which have not yet matured."

Indiana, Constitution of 1851 (in force), Article X, Section 2: "All the revenues derived from the sale of any of the public works belonging to the State, and from the net annual income thereof, and any surplus that may, at any time, remain

in the Treasury derived from taxation for general State purposes, *after* the payment of *the ordinary expenses of the government, and* of the *interest* on bonds of the State, other than bank bonds, shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the public debt."

The ordinance relating to the State debt which was adopted as part of the Louisiana Constitution of 1879, reduced the interest payable on certain State bonds fixing the rate from January 1st, 1880, at 2 per cent. for five years thereafter, and provided in Article 3: "Be it further ordained, That the coupons of said consolidated bonds falling due the first day of January, 1880, be and the same is hereby remitted, and any *interest taxes* collected to meet said coupons are hereby *transferred* to defray the *expenses of the State Government.*"

Michigan, Constitution of 1850 (in force), Article XIV., section 1, provides that, "The Legislature shall provide for an annual tax, sufficient with other resources, to pay the estimated *expenses of the State Government*, the *interest of the State debt*, and such deficiency as may occur in the resources."

North Dakota Constitution, Article II., Section 174, provides that: "The legislative assembly shall provide for raising revenue sufficient to defray *the expenses of the State* for each year, not to exceed in any one year four mills on the dollar of the assessed valuation of all taxable property in the State, to be ascertained by the last assessment made for State and County purposes, and *also* a sufficient sum to pay *the interest on the State debt.*"

Ohio Constitution, Article XII., section 4, provides that: "The General Assembly shall provide for raising revenues sufficient to defray the *expenses of the State* for each year, and *also* a sufficient sum to pay the *interest on the State debt.*"

Oklahoma Constitution, Article X., section 2, provides that: "The Legislature shall provide by law for an annual tax sufficient, with other resources, to defray the estimated *ordinary expenses of the State* for each fiscal year."

Section 4 provides that: "For the purpose of paying *the State debt*, if any, the Legislature shall provide for levying a tax, annually, sufficient to pay the annual *interest and principal of such debt* within 25 years from the final passage of the law creating such debt."

Oregon, Constitution of 1857 (in force), Article IX, section 2: "The Legislative Assembly shall provide for raising revenue sufficient to defray the *expenses of the State* for each fiscal year, and *also* a sufficient sum to pay the *interest on the State debt*, if there be any."

Pennsylvania, Constitution of 1838, Article XI (added 1864), Sections 1, 2 and 3 provide for the creation of State debts. Section 4 provides for the creation of a sinking fund to pay the accruing interest and annually to reduce the principal of the State debt and then provides: "The said sinking fund may be increased from time to time by assigning to it any part of the taxes or other revenues of the State not required for the *ordinary and current expenses of government*."

Pennsylvania, Constitution of 1873, Article IX., Section 11, is in substance the same as Section 4 of Article XI. of the preceding Constitution referrred to above, and provides that: "Said sinking fund * * * shall be increased from time to time by assigning to it any part of the taxes or other revenues of the State not required for the ordinary and current expenses of government."

South Dakota Constitution, Article XI., Section 1, provides that: "The legislature shall provide for an annual tax sufficient to defray the estimated *ordinary expenses of the state* for each year, not to exceed in any one year two mills on each dollar of the assessed valuation of all taxable property in the state, to be ascertained by the last assessment made for state and county purposes.

"And whenever it shall appear that such ordinary expenses shall exceed the income of the state for such year, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of such ensuing year. And for the purpose of paying *the public debt* the legislature shall provide for levying a tax annually, sufficient to pay the *annual interest and the principal of such debt* within ten years from the final passage of the law creating the debt, provided that the annual tax for the payment of the interest and principal of the public debt shall not exceed in any one year two mills on each dollar of the assessed valuation of all taxable property in the state as

ascertained by the last assessment made for the state and county purposes."

In the case of *In re Limitation of Taxation*, 3 S. D., 456, the court construed Section 1 of Article XI. of the Constitution as follows : " This section relates to three different and distinct items of taxation : First, the annual tax for defraying *the ordinary expenses* of the State ; second, taxes to pay deficiencies from preceding years ; third, taxation for the purpose of paying *the public debt.* * * * When the purpose is to pay the public debt, the Legislature shall provide for levying an annual tax sufficient to pay the annual interest and the debt with ten years. The tax, *like the one* for the estimated ordinary expenses, is limited to two mills on the assessed valuation of property."

Texas Constitution, Article XI., Section 6, provides that : " Counties, cities and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken ; but all such taxes shall be assessed, and collected *separately* from that levied, assessed and collected for current expenses of municipal government, and shall when levied specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds or other indebtedness for the payment of which such tax may have been levied."

Virginia Constitution, Article XIII., Section 188, provides that : " No other or greater amount of tax or revenue shall at any time be levied than may be required for the *necessary expenses* of the government, *or* to pay the *existing indebtedness* of the State."

Section 189 fixes the rates of State taxation on property, and provides that the proceeds " shall be applied to the expenses of the government *and* the indebtedness of the State."

Washington Constitution, Article VII., Section 1, provides that : " The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated *ordinary expenses* of the state for each fiscal year. And for the purpose of paying the *state debt*, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the *annual interest and principal of such debt* within

twenty years from the final passage of the law creating the debt."

West Virginia Constitution, Article X., Section 4, provides that: "The payment of any liability other than that for the *ordinary expenses* of the State, shall be distributed over a period of at least twenty years."

Section 5 provides that: "The power of taxation of the Legislature shall extend to provisions for the payment of the *State debt* and *interest* thereon, the support of free schools, *and* the payment of the annual estimated *expenses of the State.*"

(j) The Distinction Between Ordinary Expenses of Government and Interest on a Public Debt is Apparent in the Case of Municipal Corporations.

The line of division between ordinary expenses of government and interest on a public debt is plainly marked in the case of municipal corporations. It is familiar law that a municipal corporation has no power to issue bonds without express authority from the Legislature, and statutes giving such authority are strictly construed. It necessarily follows that a municipal corporation has no power to impose taxes for the purpose of paying bonds or interest thereon unless authority to issue the bonds was duly conferred. On the other hand, a municipal corporation, by virtue of its creation, has implied power to incur debts for the purpose of its existence and to raise money by taxation to pay these living expenses. In U. S. vs. New Orleans, 98 U. S., 381, 393, Mr. Justice Field, speaking for this court, said: "When such (municipal) a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of side-walks, sewers and drains, the introduction of water, and the establishment of a fire and police department."

Is it not clear that the expenses, which municipal corporations have power to incur by necessary implication, are ordinary expenses of municipal governments as distinguished from those payments which are not necessary to their existence and grow out of obligations which depend for their validity on the express authorization of the Legislature?

(k) THE ADJECTIVES "ORDINARY," "CURRENT" AND "NECESSARY" WHEN APPLIED TO GOVERNMENTAL EXPENSES ARE SYNONYMOUS.

The Master has pointed out that the expression considered by the courts in some cases is "ordinary expenses," while in others it is "current expenses," and in still others it is "necessary expenses." These different phrases also appear in the constitutional provisions which we have quoted. The Master rightly concludes that the courts treat the adjectives "ordinary" and "current" when applied to expenditures of a State or a municipality as synonymous (Master's Report, pages 91, 92). This court in considering the terms of a private trust said: "We think the correct interpretation to the phrase 'current expenses' was given it by the Circuit Court, namely, ordinary expenses" (*Taylor vs. Mayo*, 110 U. S., 330). The cases, furthermore, show that the expression "necessary expenses," when the context shows that regularly recurrent expenses of government are referred to, has the same meaning as "ordinary expenses" and "current expenses." We submit that all these phrases describe the expenses which are incurred in carrying on the regular work of government. Judge LURTON in the case of *City of Cleveland vs. U. S.*, 111 Fed. Rep., 341, 350, defined current expenses as follows: "Those current expenses proper for the maintenance of the City government and chargeable against current revenue." In *Burch vs. Earhart*, 7 Ore., 58, 66, Chief Justice KELLOGG gave the following definition: "Current expenses of the State mean the ordinary running liabilities incurred by the State in the administration of its offices from year to year." In *Dunbar vs. Board, etc.*, 5 Ida., 407, 412, 413, the court, referring to the ordinary expenses of a county, defined them as, "Ordinary expenses such as are usual to the maintenance of a county gov-

ernment, the conduct of its necessary business, and the protection of its property."

(l) The Master's Argument.

The regular work of government to which the foregoing definitions refer differs according to the needs, the means and the demands of different communities. The Master's Report (page 87) states: "The defendant contends that the language should receive a construction which would make 'ordinary' synonymous with 'necessary' or 'essential' used in the sense of indispensable expenses—expenses which if not paid, the wheels of government will cease to revolve, without the payment of which the State government cannot be administered." In one sense this is a correct statement of defendant's position, but not in the sense in which the Master apparently understands this statement. On page 92 of his report the Master says: "The defendant relies upon the line of cases where judgment creditors seeking to recover payments from the revenues of the municipality have been postponed to ordinary, current or necessary expenses, which are made a primary charge upon revenues. The cases clearly establish the general doctrine. From some of them it might perhaps be inferred that interest was not a primary charge or an ordinary, current or necessary expense. I find none of them however where the specific question as to whether interest is or is not an 'ordinary expense' is concerned. It is very clear that all essential expenses are also 'ordinary expenses,' but it does not by any means follow that all 'ordinary expenses' are essential expenses, that there may not be 'ordinary expenses' which are not essential expenses. If it were true that judgment creditors were postponed only to essential or indispensable expenses, the cases might be entitled to considerable significance. On the contrary, however, the postponing of judgment creditors is not confined to essential or indispensable expenses, as expenses which do not come within that class, are often held to be primary in their character and to precede judgment creditors as a charge upon the current revenues. The following cases show that such current or ordinary expenses as light, water and fire protection, none of which are essential to the revolution of the wheels of govern-

ment, have been held to be ordinary or current expenses that will be made a charge upon the revenues prior to the claims of judgment creditors, thus demonstrating that the essential character of the expenditure is not the test of an ordinary expense.' "

(m) FALLACY OF THE MASTER'S ARGUMENT.

The Master's argument in substance appears to be this: He concedes that the payment of interest on a public debt is not an "essential expense," indispensable to carrying on the government, but he argues that because judgment creditors are postponed not only to essential expenses but also to "ordinary expenses" which are not "essential," therefore the cases relating to judgment creditors do not decide that payment of interest on a public debt is not an ordinary expense. It would be a sufficient answer to point out that in some cases the judgments which were postponed to ordinary expenses were judgments for interest on a public debt. The fallacy of the Master's argument, however, lies in his assumption that he or a court can determine what is an indispensable or essential expense of a particular government. The true rule is that this a matter to be determined by the government, and that the determination of the government cannot be reviewed by a court in the absence of clear abuse of discretion. The requirements of a highly developed State are different from those of a newly settled State. The essential expenses of a City like New York are in number and kind very unlike those of a town in a sparsely settled western State. There is no conflict in the cases if one bears in mind this rule, that the judge of the necessity of expenses is the government itself. When this rule is born in mind it is evident that the Master is wrong, and that there can be no ordinary expenses of government in the sense in which this phrase is used by the courts, which are not essential expenses. The rule as we have stated it has been established by the highest authorities. In *City of East St. Louis vs. U. S.*, 110 U. S., 321, Mr. Justice MATTHEWS in delivering the opinion of the court said: "The question, what expenditures are proper and necessary for the municipal administration is not judicial; it is confided by law to the discretion of the municipal authorities. No court has

the right to control that discretion, much less to usurp and supersede it." The same rule is also recognized and approved in the following cases:

White vs. Mayor, 109 Ala., 476.
Mayor vs. State, 32 La Am., 748, 749.
State ex rel. Lorenz vs. New Orleans, 116 La., 851.
Sherman vs. Langham, 92 Tex., 13.
Young vs. Lamb, 43 Neb., 813.
State vs. Sheldon, 52 Neb., 364.
Ward vs. Piper, 69 Kan., 773.

(n) By the Great Preponderance of Judicial Construction Interest on a Public Debt Is not an Ordinary Expense of Government. The Authorities.

The cases in which the question has arisen whether ordinary or current expenses of government include interest on a public debt are few. This we are persuaded is due to the general understanding as indicated by the constitutional provisions cited above, that interest on a public debt is not one of such ordinary expenses. The cases to which we shall now call the attention of the court, however, seem to us sufficient in number and weight to be decisive on this question.

In the case of *Quincy vs. Jackson*, 113 U. S., 332, a creditor who had recovered a judgment upon coupons for interest on bonds which the City of Quincy had issued in payment of a subscription for stock of a railroad company, had petitioned for a writ of mandamus to compel the City to levy taxes for the payment of his judgment. The City was empowered by a law passed in 1863 to levy taxes not exceeding fifty cents on each One hundred dollars ($100) of the assessed value of property " to pay the debts and meet the general expenses of said City." In 1869 the Legislature passed the act authorizing the subscription for railroad stock in payment of which the City had issued the judgment creditor's bonds. The City contended that its power to tax was defined by the act of 1863, and that this power had been exhausted. The court, however, decided that the act of 1863 applied only to taxation for raising money to pay ordinary expenses, that the indebtedness arising on the bonds given for railroad subscriptions was not of this character, and the power to tax for the purpose of raising money to pay the bonds was implied in the

grant of authority to issue the bonds in payment of the stock subscription. Mr. Justice HARLAN speaking for the court said (page 336): "The a / of 1863 related to debts and expenses incurred for ordinary municipal purposes and not to indebtedness arising from railroad subscriptions, the authority to make which is not implied from any general grant of municipal power, but must be expressly conferred by statute." Referring to the act of 1869, which authorized the City to subscribe for the railroad stock, Mr. Justice HARLAN further said (page 337): "It could not have been contemplated that indebtedness thus created would be met by such taxation as was permitted for ordinary municipal purposes. In giving authority for such extraordinary indebtedness the Legislature did not restrict its corporate authorities to the limit of the taxation provided for ordinary debts and expenses. The limitation imposed by the City's charter upon its power of taxation had reference to its ordinary municipal debts and expenses." This decision is in point. The judgment sought to be enforced was for interest on a public debt. The limited power of the City to tax for the purpose of meeting its ordinary expenses had been exhausted, and if the court had deemed interest on a public debt an ordinary expense the writ of mandamus must have been refused, but the court held that the interest on this public debt was not an ordinary expense, and therefore, the limitation upon the City's power to tax for ordinary expenses did not apply.

In *Clay County vs. McAleer*, 115 U. S., 616, the case arose on a petition for a writ of mandamus to compel Clay County to levy a sufficient tax to pay the petitioner's judgment. It appeared that the power of the County to levy for ordinary County revenue was limited to six mills, and by demurrer to the answer it was admitted that the maximum levy would not be sufficient to pay the ordinary current expenses of the County, and that no part thereof could be applied for the payment of the petitioner's judgment without seriously impairing the efficiency of the County government. The court held that no levy could be ordered to pay the relator's judgment, saying (page 618): "Here the answer shows affirmatively that the whole of the six mill levy of 1882 will not be sufficient to pay the ordinary expenses of the County."

East St. Louis vs. U. S., 110 U. S., 331, is to the same effect.

In *Sibley vs. Mobile*, 3 Woods, 535, 541, Judge WOODS referring to the bondholders who had recovered judgment against the City said that they "are entitled to have all the taxing power of the City within the constitutional limit exercised, if necessary, to secure the performance of the contract made by the City with them. When that power is exercised the current expenses of the City must be paid out of the fund so raised, and out of the residue the relators are entitled to share *pro rata* with the other creditors of the City who have no specific lien or claim to any portion of the taxes."

Accord *Mayor, etc., of New Orleans vs. U. S.*, 49 Fed. Rep., 40.

In the case of *Ward vs. Piper*, 69 Kan., 773, a creditor who had obtained a judgment for interest on township bonds applied for a writ of mandamus to compel the officers of Isabel Township to pay his judgment. The plaintiff asked to have the fund which had been levied and collected to meet the general current expenses of the Township applied to the payment of his judgment. This was denied by the court. JOHNSTON, C. J., delivering the opinion, said (page 775): "It is not alleged nor shown that the funds raised for current expenses are more than sufficient for that purpose. It does not even appear that the indebtedness on which the judgment was founded was for an ordinary expense of the Township to which funds derived from a levy for legal expenses could be legally applied. The taxes levied for one purpose cannot be diverted and applied to another. Presumably the Township officers are acting in good faith, and have levied and raised a fund which is necessary as well as sufficient to meet the ordinary current expenses of the economical administration of the Township. The Township organization must be maintained and its current expenses met, although creditors of the Township must wait for the payment of their bonds and judgments."

In *State ex rel. Watkins vs. Macon County Court*, 68 Mo., 29, a creditor who had recovered judgment on bonds which the County had issued in payment of its subscription for stock in a railroad company, applied for a writ of mandamus to compel

the County to pay his judgment out of its general fund. It appeared that the statute which authorized the County to issue bonds in payment of the subscription provided for a tax not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property in the County for the purpose of paying the interest on the bonds, but this special tax was insufficient to pay relator's judgment. The case arose on demurrer to the return which alleged that all of the general fund was needed to pay the current and necessary expenses of conducting the County government. The court refused to grant the writ of mandamus. Judge NORTON, in the opinion of the court, which he delivered, said (p. 42): "What then, are the purposes for which the general expenditure or common fund of a county is raised? A proper answer to this question can only be returned by the law which authorizes a levy of taxes to produce it. That law is to be found in Wagner's Statutes, section 165, page 1193, and is as follows: 'The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for State purposes, * * * but the county tax shall in no case exceed one-half of one per cent.' The revenue derived from the tax thus authorized to be annually imposed, is in the very terms of the law declared to be to defray the expenses of the county, which we understand to mean the ordinary current expenses incurred in conducting the county government, such as the payment of grand and petit jurors, witnesses summoned before the grand jury, costs of criminal prosecutions, expenses in supporting the poor and insane of the county, salaries of officers, assessing and collecting the revenue, &c.

"That an extraordinary indebtedness incurred by a county in subscribing stock to a railroad corporation and in issuing bonds in payment, was never intended by the General Assembly to be embraced in the words 'expenses of the county,' or that they contemplated the creation of any debt for county purposes is manifest from section 166, which makes it the duty of the county court, after the assessor's book has been adjusted and returned, 'to ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes so as to raise the required sum.' If section 165, *supra*, was in-

tended to authorize the creation of debts or provide for their payment, the General Assembly would, doubtless, have so expressed themselves as they did in sections 1 and 7, page 115[illegible], of the same law in providing for the levy of State taxes. Section 1 provides that 'for the support of the government of the State, the payment of the State debt, * * * taxes shall be levied on all property, real and personal,' * * * and section 7 provides that there shall annually be levied, assessed and collected on the assessed value of all the real and personal property subject to taxation in the State, one-fifth of one per cent. for State revenue, and one-fourth of one per cent. for the payment of all State indebtedness. The State revenue thus provided is in express terms for the support of the State government, and the county revenue provided for in section 165 is for the payment of the expenses of the county government.

"That such an extraordinary indebtedness as is incurred by a county in issuing bonds in payment of a railroad subscription was not intended to be embraced in the terms 'expenses of the county,' is apparent when it is considered that the very same words used by the General Assembly in section 165, are to be found in section 20, Revised Statutes 1825, page 671, except in the latter act, the tax authorized was limited to 50 per cent. of the amount of State tax. The same section was continued in the Revised Code of 1835, except that the amount of tax was in no case to exceed the amount of the State tax. It is also to be found in the code of 1845, and that of 1855, the only difference being that in the former the rate of taxation was not to exceed 34 cents, and in the latter not to exceed 40 cents on a valuation of $100. It is clear that the General Assembly in 1825 and in 1835, when they authorized the county courts to levy such tax from time to time as should be necessary for defraying county expenses, could have had no reference to such indebtedness as arises from a county bond issued in discharge of a subscription to the stock of a railroad corporation, because, at that time, there was no law to be found on our statute books authorizing such subscriptions or the issuance of any such obligations."

Accord *State ex rel. Hudson vs. Trammel*, 11 S. W. Rep.,747, Missouri.

City of Denison vs. Foster, 37 S. W. Rep., 167, Texas.
Cromarty vs. Commissioners, 85 N. C., 211, 87 N. C., 134.

In the foregoing cases creditors who had recovered judgments on claims for interest on municipal bonds were not allowed to take funds raised for the payment of the ordinary expenses of the municipalities when the funds were needed for this purpose. The decisions conclusively establish that interest on a public debt is not an ordinary expense of government; if it had been, the courts would have been bound to hold that funds devoted to the payment of ordinary expenses should be applied to the payment of such interest, but they held instead that the claims for interest must wait for payment until the ordinary expenses had been paid. The Master's Report (page 108) protests that the cases of the judgment creditors are not directly in point, because the present case is not a controversy between a judgment creditor and a municipality; but surely the principle which governed the decisions by which the payment of judgments for interest on a public debt were postponed to the payment of ordinary expenses, is the same principle which must govern in the controversy between Virginia and West Virginia. The question here is the same as the question in these cases, namely, whether interest on a public debt is an ordinary expense of government. The cases cited above decided that it was not.

In *White vs. Mayor*, 119 Ala., 476, the case arose on an application by the holder of a judgment based on coupons for interest on bonds of the town of Decatur for a writ of mandamus to compel the town to pay this judgment out of its general revenue. The Court held that the petitioner was entitled to mandamus, applicable, however, only to the surplus of the town's revenue over its current expenses. McCLELLAN, J., in delivering the opinion of the Court, said page 480: "It is thoroughly well settled law that where the interest and principal of a municipal bonded debt is payable out of the general revenue of the town, no part of such revenue that is necessary to meet current legitimate municipal expenses can be subjected to the payment thereof, but only to the surplus of income after the governmental expenditures have been met or provided for can by any process of law be applied to such

debt. Dill v. Mun. Corp., Secs. 100, 101 ; Underhill v. Calhoun, 63 Ala., 216 ; Williamsport v. Com., 190 Pa. St., 498 ; East St. Louis v. U.S., 110 U. S., 321 ; Com. v. Commission, 1 Wharton, 1. Nor can it make any difference that the bonded debt is specially charged upon the general revenues or that the corporate authorities are specially required to set apart a sufficiency of such revenues to meet such debt * * * with or in the absence of such provisions, it is within the power of and is the duty of municipal corporations * * * to apply the whole revenues to current municipal expenses, leaving nothing to go in payment of bonded bebts, nor can the courts determine what municipal expenditures are necessary. If a given expenditure is within charter authorization and therefore, abstractly considered a legitimate municipal charge, the courts cannot pass upon the advisability or wisdom of its being made or incurred."

In the case of *Anniston v. Hunt*, 140 Ala. 394, the charter of the City of Anniston required the City Council before July 1st in each year to agree upon a budget of expenses for governmental purposes for the year ending on the 30th of the following June. In making up the budget for the year ending June 30th, 1903, the Council had included among the expenses for government purposes an item of $7,600 for interest on bonds of the City. A judgment creditor of the City applied for a writ of mandamus commanding the Mayor and Councilmen to pay his judgment out of the surplus revenue of the City for the year ending June 30th, 1903, and restraining them from paying the interest on the bonds which had been included in the budget among the government expenses. If the revenues were not applied to the payment of this interest there would be a surplus to pay the petitioner's judgment. The writ of mandamus was granted and the Supreme Court affirmed the judgment of the court below. In delivering the opinion of the court, HARALSON, J., said (p. 400) : " We have found neither in the charter nor in any other statute any legislative authority to make the interest income on municipal bonds and accounts an item of expenditure for the administration of government purposes. The Council, therefore, had no right to estimate this interest as a government expense and by way of anticipation in their budget of expenses to appropriate the amount to the payment of interest on municipal bonds and accounts so

as to defeat the plaintiff or other creditors in their efforts to subject this excess over necessary current expenditures to the satisfaction of their demands."

In *Leavitt vs. Town of Somerville*, 75 Atlantic Rep., 54 (Maine, 1909), the question was whether certain bonds of the Town were valid under the constitutional provision limiting the debt which the Town could incur. The bonds in question, which exceeded in amount the limit of indebtedness, purported to refund a debt existing at the time when the constitutional limitation took effect. The amount of the bonds was larger than the original debt, but if the excess represented accumulated interest the bonds would be valid. The court, however, declared this fact had not been proved, saying (page 57): "There is no legitimate inference that the Town officers paid current expenses any more than that they paid the interest on the Town debt."

In *Dexter vs. County Commissioners*, 20 Weekly Law Bulletin, 364 (Hamilton County, Ohio, Common Pleas), it was held that the estimated levy which the statutes required the Auditor to present to the County Commissioners on or before the first Monday in April of each year, was intended to cover current expenses as distinguished from the payment of the bond liabilities of the County, and that the acts creating sinking funds for future payments of outstanding bonds did not contemplate the payment of debts and the accumulation of moneys for that purpose as among the current monthly or annual expenses of the County.

In the case of *University R. R. Co. vs. Holden*, 63 N. C., 410, the Supreme Court of North Carolina had occasion to construe a provision of the recently adopted Constitution of 1868. This provision, contained in Article 5, Section 1 of the Constitution, is as follows: "The General Assembly shall levy a capitation tax on every male inhabitant—which shall be equal, on each, to the tax on property valued at $300 in cash. * * * And the State and County capitation tax combined shall never exceed $2.00 on the head." The question was whether this provision, requiring what the court called an equation of taxation between the property tax and the capitation tax, applied to all taxes, or whether it was limited. The court gave the question most careful consideration, deeming it so important that each of the judges delivered a separate

opinion. The conclusion of the judges was that the equation of taxation established by the provision which we have quoted did not apply to all taxes, but only to taxes imposed for the ordinary expenses of government, and the judges expressly declared that the equation of taxation did not apply to taxes imposed for the purpose of raising money to pay interest on a public debt. PEARSON, C. J., said (page 414): "I agree that if under this equation, carried to its limits, the amount is not enough to meet current expenses, and also to pay the interest on the public debt, then for the excess needed it is not only within the power, but it is the duty of the General Assembly to disregard the equation."

READE, J., said (page 418): "My construction of the tax power of the Legislature under the Constitution is as follows: (1) The first object of the convention in the fifth article of the Constitution was to provide for the ordinary and current expenses of the government; that is done in Sections 1, 2 and 3. And for that purpose the tax is limited to $2 on the poll, and the same amount on $300 worth of property, and the equation must be observed. This was thought to be sufficient for the ordinary and economical administration of the government. (2) We had a considerable public debt, and, after providing for current expenses, the next consideration was, how is the public debt to be met? And the 4th section provides, that a special tax shall be laid for that."

DICK, J., said (page 432): "The object of the convention in Article 5, section 1, was to provide a system of general taxation for the ordinary expenses of the government. * * * Sections 1, 2 and 3 establish a general revenue system for the State; and sections 4 and 5 provide special taxes for the State indebtedness, unexpected exigencies and for the completion of unfinished railroads."

Speaking in reference to Section 5, Article 5, of the Constitution, which authorizes the State to issue bonds for extraordinary purposes, Judge DICK said (page 433): "The convention evidently contemplated the necessity of incurring new debts outside of the ordinary expenses of the government."

SETTLE, J., said (page 436): "I conclude that the equation of taxation applies only to the ordinary expenses of the State government. It does not apply to the public debt."

The opinion of the Judges in University R. R. Co. vs. Holden that the equation of taxation prescribed in Section 1, Article 5, of the North Carolina Constitution, applies only to taxes imposed for the payment of the ordinary expenses of government and does not apply to taxes imposed for payment of interest on a public debt, was affirmed after very careful consideration of the whole subject and a review of all the authorities in the recent case of *Southern Ry. Co. vs. Board of Commissioners of Mecklenberg County*, 148 N. C., 220.

The case of *Union Pacific R. R. Co. vs. U. S.*, 99 U. S., 402, though it relates to a private corporation, is, we submit, in point, because it decides that interest on a funded debt is not an ordinary expense. The question in the case was whether the Union Pacific Company was liable to account to the Government for five per cent. of its net earnings under the Sixth section of its charter, and the court had to determine what was meant by the expression "the net earnings of the road." Mr. Justice BRADLEY, who delivered the opinion of the court, said: "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the Company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. * * * All payments of interest on the bonded indebtedness of the Company should be charged to capital interest account, and not to current expenditures. Though payable out of earnings before any dividend can be made to stockholders, they cannot be deducted for the purpose of ascertaining the 'net earnings' of the road, as

that term is to be understood in the sixth section of the Act. The bonded debt incurred for the purpose of construction and equipment is but another form of capital, analogous to preferred stock; and the interest accruing thereon is in the nature of a dividend on such capital. It has nothing to do with and cannot affect the amount of the net earnings of the road."

(o) LEGISLATION OF VIRGINIA DURING THE PERIOD COVERED BY THE ORDINANCE DID NOT DEAL WITH INTEREST ON THE PUBLIC DEBT AS AN ORDINARY EXPENSE OF GOVERNMENT.

The Legislature of Virginia, in its appropriations, from 1823, did not deal with the interest on the internal improvement debt as one of the items constituting the ordinary expenses of the State Government. The fiscal year of the State began on the first day of October of each year. The annual Appropriation Bill constituted a general fund of the taxes and arrears of taxes due on the first day of October, last preceding, not otherwise appropriated, and all other branches of revenue not appropriated by law, which shall come into the public treasury prior to the succeeding October and the surplus of all appropriations theretofore made, shall constitute a general fund, and be appropriated in specific sums as follows, to wit:

To the expense of the General Assembly; to the salaries and allowances of the officers of the civil government; to the commissioners of the revenue, for examining commissioners' books; to defray criminal charges, including the expense of guarding jails; for pensions, civil contingent fund, militia establishment, including the services of clerks of courts-martial, of adjutants, provost marshals, and expresses, and for the purchase of drums, fifes, and to pay for instruments where the fines of the regiment are insufficient, pay of the adjutant and inspectors; internal charges of the penitentiary, house and officers' salaries and the transportation of criminals, to the penitentiary, such balance of former appropriations to complete penitentiaries; public guard in the City of Richmond; slaves executed or transported; expense of representation to Congress and State Senate; public warehouses, including the pay of superintendents, civil prosecutions, including clerks and sheriffs' fees; services of guard at Lexington Arsenal; for the

collection and transportation of arms; to constitute the balance of military contingent fund, including claims for services during the last war; transportation of public arms; defray expense of publishing the map of Virginia; complete erection of Western lunatic hospital; support of lunatic hospital at Williamsburg; transportation and expenses of lunatics confined in jail, etc.—all ordinary expenses of the State Government.

In addition, the Legislature made specific appropriation to pay the interest on $319,000 of the Seven Per Cent. Debt, and on two certificates of Six Per Cent. Debt held by the Literary Fund, $23,773. This appeared to be the *general debt* outstanding. These bonds, held by the Literary Fund, were owned by the State; and this was simply the measure of annual appropriation to that fund, for purposes of convenience, such as has been frequently resorted to by other States.

The second section provides that so much of the public revenues, and of other public moneys *not otherwise appropriated by law* as may be received into the treasury after the thirtieth day of September, next, and the surplus of all other appropriations heretofore made, shall constitute a general fund to defray such expenses authorized by law as are not therein specifically provided for; and to defray the current and other expenses of the Commonwealth in the fiscal year commencing on the first day of October, next, and terminating on the 30th day of September, 1828 (this was the Act of 1827); and the Auditor of Public Accounts is authorized and required to issue his warrants in the same manner as if the funds had been specifically mentioned, with such exceptions, etc. This was the Act passed March 8, 1827; and those which had preceded it, from 1822, did not differ.

As early as 1840, in none of these appropriation bills was interest appropriated for the payment of bonds issued for internal improvements.

As early as 1840, the Annual Appropriation Bill changed in respect of the provision as to interest. It created, as did its predecessors, a general fund constituted of the taxes and arrears of taxes due to the preceding October, and not otherwise appropriated, and all other branches of revenue not appropriated by law which should come into the treasury prior

to the succeeding October, and the surplus of all other appropriations.

Out of this fund, were appropriated expenses of the General Assembly, officers of the civil government, commissioners and clerks, criminal charges, and items similar to those mentioned in the Act of 1827.

And it provided expressly and specifically for interest on the public debt as follows:

To pay the interest on certain certificates of public debt, to wit:

For one year on seven per cent. debt, due Literary Fund, $22,330;

Half year's interest on same, unpaid on October 1st last and chargeable on present fiscal year, $11,165;

(This did not default the State, for she had the bonds on which she had omitted to pay interest to the Literary Fund.)

One year's interest on 6 per cent. debt, held by Literary Fund, $1,442.35;

One year's interest on $250,000 of 5 per cent. stock subscribed to the Chesapeake and Ohio Canal Company guaranteed by the Act of February 18, 1833, $12,500;

One year's interest on $298,700, certificates issued for money borrowed to pay Commonwealth's subscription to the stock of the Exchange Bank, $19,922;

Ten months' interest on $62,825, additional sum borrowed to pay Commonwealth's subscription to stock of Exchange Bank, $3,143.23;

One year's interest on $80,592, certificates issued for money borrowed to pay Commonwealth's subscription to stock of the Northwestern Bank, $5,315.52;

and then, after appropriating for contingent expenses of courts, pensions, civil contingent fund, militia, public guards, slaves transported, representation to Congress and the State Senate, warehouses, civil prosecutions, arms, military contingent fund, removal of lunatics in jails, vaccine agents, roads, military school, electors, clerks of committees, sweepers of the Capitol, principal engineer, etc., etc.

Section 3 provides that so much of the public revenue and all other moneys not otherwise appropriated by law as may

be received into the public treasury, after the 30th day of September, next, and the surplus of all other appropriations heretofore made, shall constitute a general fund to defray expenses authorized by law which are not herein particularly provided for, and to defray the current and other expenses of the Commonwealth in the fiscal year which will commence on the first day of October, next, and terminate on the 30th day of September, 1842; and the Auditor of Public Accounts is hereby authorized and required to issue his warrants in the same manner as if the sums had been specifically mentioned, subject to such conditions, exceptions, and limitations, as the General Assembly may prescribe by law.

Then comes an additional section, which was continued in each appropriation act until after the establishment of the sinking fund for the payment of interest and principal on the public debt, provided for by the Constitution of 1850. It will be remembered that the stock for which the Commonwealth subscribed, and the dividends thereon, were, in each instance pledged, primarily, together with the improvement fund, not otherwise appropriated. It enacted, further, that if the revenue of the fund for internal improvement shall, at any time, be insufficient to meet the payments of the interest charge on such fund as it shall become due upon loans obtained for purposes of internal improvement, under existing or future acts, of the General Assembly, such interest *shall be paid out of any money in the Treasury not otherwise appropriated;* and the Auditor of Public Accounts is hereby authorized and required, upon the receipt of the order or orders of the Board of Public Works, certifying the fact of such insufficiency in the funds of said Board, to issue his warrant or warrants in their favor for the necessary sum or sums which shall be deposited in the treasury to the credit of the fund for internal improvement, to be applied by the said Board on the warrants of the second Auditor towards the payment of such interest.

Here, it will be noticed, interest on the internal improvement loans, perhaps as a reason why specific appropriations were not made in any year to pay the interest on internal improvement loans, is that by law the primary security for such loans was the stocks and dividends derived from the

stocks, and the internal improvement fund, which, if taken together, were inadequate, were supplemented by the pledge of the Commonwealth to raise the money otherwise necessary to pay the interest and the principal as it matured. By this provision, it is seen that the interest on the internal improvement fund, where the special security proved inadequate, was to be paid out of money deposited to the credit of the internal improvement fund ; not, by the act, otherwise appropriated. In other words, the payment of interest on internal improvement loans, was deferred to all appropriations for the ordinary expenses of the Government, whether specifically made, or generally appropriated, by Section 3 above quoted. And that provision was the last section of every appropriation act from 1840 to the time the sinking fund was established. Twenty million dollars of this debt was incurred between 1850 and 1861, after the sinking fund for the payment of interest and principal had been created.

(p) THE CREATION OF A SINKING FUND FOR THE PAYMENT OF INTEREST ON THE VIRGINIA DEBT SHOWS IT WAS NOT AN ORDINARY EXPENSE OF THE STATE GOVERNMENT.

The very fact of the creation of a sinking fund for the payment of interest on the public debt differentiates it from ordinary expenses of the State Government.

Whoever heard of the payment of the ordinary expenses of a State Government out of a sinking fund ?

Section 29 of Article IV of the Constitution of 1850, sets apart annually, from the accruing revenues, a sum equal to seven per centum of the State debt, as existing on the first day of January, 1862, to be called " The Sinking Fund," and applied to the payment of the interest on the State debt and the principal or such part as may be redeemable. If no part be redeemable, then the sum so remaining shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt as it shall become redeemable. And it made subject to this provision all debts contracted by the Commonwealth thereafter.

It added this provision:

> "The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion."

If there were a deficiency in the Treasury, because of an under-estimate of the revenue, or of the expenses of the Government, resort could not be had, for its payment, to the sinking fund. That one fund could be resorted to only for a purpose other than that for which it was created and set apart, in case of war, insurrection or invasion.

The creation of a sinking fund, which is so common in all the Constitutions, and has been for a great many years in most Constitutions, marks, in an illuminating way, the distinction between the ordinary expenses of a State Government and the interest to accrue upon the public debt.

The ordinary annual expenses of the State Government are estimated for. They change. Some times they exceed the estimate; and there is a deficit, although, by the Federal Government, that has been prohibited by law, as has been done by the Constitutions of some of the States. It is true that ordinary expenses are estimated for by county governments and other municipalities, even towns and villages. Speaking in respect of governments, sometimes additional offices are created; some times departments or bureaus, which have long existed, have, in legislative judgment, become unnecessary, and they are disposed of, and their duties transferred to some other department, or altogether pretermitted. But who ever heard of estimating the interest on the public debt? That does not fluctuate. It may be enlarged by the increase of debt, or diminished by payment of debt; but it is always susceptible of accurate ascertainment. It is fixed. In corporate management, it is characterized as a "fixed charge," as contradistinguished from ordinary expenses.

The ordinary expenses of the Government, changing from time to time, must continue as long as the Government lasts. The interest on the public debt continues as long as the debt lasts.

The philological distinction as to the difference between the expenses of the Government—ordinary, essential and nec-

essary—confuses; but does not enlighten. They come to the same thing in the end.

(*q*). The Words of the Ordinance Should be Construed in the Light of the Surrounding Circumstances.

This Court said, in *Sand Filtration Corporation vs. Cowardin*, 213 U. S., page 364:

> "The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made."

This is a succinct and clear definition. It must be remembered, in reading the Ordinance, that, at the time it was drafted and adopted, the debt of the Commonwealth of Virginia was about $33,000,000.00, the proceeds of which she had either expended directly for internal improvements or had invested in bank stocks, the stocks of railway companies, navigation companies, turnpike companies and bridge companies. The improvements constructed by the use of this borrowed money were almost all within the present limits of Virginia, and this was well known to the men who drafted and adopted this Ordinance. These stocks were thought by Virginia to be of value, for, in her Constitution of 1850, Section 30, Article IV., it was provided:

> "The General Assembly, may, from time to time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies, and the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the sinking fund, and be applied in like manner."

Can it be supposed that the men who framed and adopted this ordinance would have been willing to stipulate that the proposed new State should take upon herself the payment not

only of a just proportion of the ordinary expenses of the State Government, but a proportion of the $18,000,000 of interest upon the moneys borrowed by the Commonwealth of Virginia from 1823 to 1861, and invested in $30,000,000 of stocks, bank and otherwise, incorporations whose improvements lay almost entirely within her limits, would remain within her limits, and which investments she was to keep? It is inconceivable.

To say that when she incurred this indebtedness, which is the sum of a great number of special loans, each with a special security, and invested the same in stocks, she did not expect them to be valuable and revenue-producing, not simply during the duration of the debt, but long after the debt should have been paid, would be to impeach her honor in the earlier, if not better days, of her existence, for she held out these stocks and dividends as the primary security of the money she borrowed, with which to repay it.

She became a great battlefield and the camping ground of contending armies; and if the ravages of war destroyed, in large measure, these improvements, and disappointed the expectation with which she had invested her money, it cannot be said that that unfortunate result is, in any wise, imputable to West Virginia, or her people.

It is not a complicated question. The words "ordinary expenses of the State Government" are words of common use, and they are without technical signification. It seems to us impossible to misunderstand them.

The ruling of the Master seems to have been unconsciously, and with perfect good faith, based somewhat upon what seemed to him to be the equitable construction which he advocates in his report. If the words "ordinary expenses of the State Government," as a matter of law, include interest on the public debt, he is right. If they do not, whatever may be the result of their exclusion from the computation, he is wrong, for it is a question of law. Whatever it means, as here used, it means wherever it is used.

(r) THE PROPORTION OF ORDINARY EXPENSES WITH WHICH WEST VIRGINIA IS TO BE CHARGED SHOULD BE ASCERTAINED UPON THE BASIS OF TAXABLE VALUES.

Whichever view this court may adopt as to the meaning of

the phrase, "A just proportion of the ordinary expenses of the State Government," the question confronts it, upon what basis or standard are these expenses to be apportioned?

FIRST. On the basis of area; or

SECOND. Upon the basis of population, and if so, shall slaves be included or excluded? or

THIRD. Shall it be upon the basis of population of 1823 of Virginia, as shown by the census of the United States, the average population to be taken as required by the decree; or shall it consist of five averages of ten-year periods combined, as taken by the master; or

FOURTH. Shall it be upon the basis of the assessed valuation of the real and personal property of Virginia and West Virginia?

FIFTH. If so, shall it be based upon the valuation of January 1st, 1861, or June 23rd, 1863.

The joint schedules returned by the master furnish a basis in accordance with the several alternatives.

We feel constrained to the opinion that the true basis is taxable values, or the average revenues for a period prior to the 1st of January, 1861. We formerly inclined to the opinion that population was the best basis. We see no reason, however, for the adoption of a basis upon which the ordinary expenses are to be apportioned which differs from the international law basis of general indebtedness, which we have somewhat discussed. A peculiar complication arises here with reference to the ascertainment upon the basis of population; and that is, the large number of slaves within the limits of Virginia and the relatively small number within that portion of Virginia which now constitutes West Virginia. Those slaves were property albeit, as we have shown, they constituted a property upon which was levied a tax entirely disproportionate to their market value. They were the subjects of barter and sale the same as any other private property in the Commonwealth was subject to it. They were taken care of by their masters. They were, of course, not given the privileges of white children in respect of common education. They did not enter into the basis of representation; and,

therefore, neither paid taxes, nor contributed to the school fund, nor derived benefit from it. Even in the emancipation of slaves by the Constitution, and free negroes, Section 19 of Article "IV" of the Constitution of 1850 provided that:

> "Slaves hereafter emancipated shall forfeit their freedom by remaining in the commonwealth more than twelve months after they become actually free, and shall be reduced to slavery under such regulations as may be prescribed by law."

Section 20:

> "The General Assembly may impose such restrictions and conditions as they shall deem proper on the power of slave owners to emancipate their slaves; and may pass laws for the relief of the commonwealth from the free negro population, by removal or otherwise."

Section 21:

> "The General Assembly shall not emancipate any slave, or the descendant of any slave, either before or after the birth of such descendant."

Section 22:

> "Taxation shall be equal and uniform throughout the commonwealth, and all property other than slaves shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law."

Section 23:

> "Every slave who has attained the age of twelve years shall be assessed with a tax equal to and not exceeding that assessed on land of the value of three hundred dollars. Slaves under that age shall not be subject to taxation; and *other* taxable property may be exempted from taxation by vote of a majority of the whole number of members elected to each house of the General Assembly."

Section 24:

> "A capitation tax, equal to the tax assessed on land of the value of two hundred dollars, shall be levied on every white male inhabitant who has attained the age of twenty-one years; and one equal moiety of the capitation tax upon white persons shall be applied to the purposes of education in primary and free schools; but nothing herein contained shall prevent exemptions of taxable polls in cases of bodily infirmity."

It seems quite impossible that slaves should be included in the population. The taxes upon them were assessed to their owners. It seems impossible that in such a situation slaves should be considered as part of the population for any purpose. Their value, as property, would, of course, enter into any calculation based upon the taxable values, or assessed value, of the separate portions of the State. And as we have already shown to the court, the population as a basis of apportionment of debt between nations, is rejected. It has also appeared that area, or territory, is rejected as a basis for the apportionment of State debts. Capitation taxes were levied by Virginia under the Constitution of 1850. During the whole period from 1823, the revenues of the State, aside from those which went into the internal improvement fund, were derived from the taxation of lands, inheritances, taxes on incomes, salaries and licenses, and almost every imaginable excise tax, including the taxation of land and personal property, as well as watches, clocks, plate, carriages and the like, and interest on the State's own securities, and excises of every imaginable description. The basis upon which the moneys were collected for the payment of ordinary expenses during these years would seem to be the basis upon which they should be apportioned between the two States.

PART FIFTH.

West Virginia is not bound to pay interest from January 1, 1861, on the proportion of the old Virginia Debt assumed by her.

1. Neither by the Ordinance nor by Her Constitution Did West Virginia In Praesenti Assume any Portion of the Public Debt of Virginia.

By the Ordinance West Virginia *was* to take upon herself a "just proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, to be *ascertained*," etc. We may here inquire what is meant by the words "to *be ascertained*"? There can be but one answer to this question, and that is, the just proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, which West Virginia was to take upon herself. How was this just proportion to be ascertained? First, by charging to it all State expenditures within the limits thereof; second, a just proportion of the ordinary expenses of the State government since any part of the said debt was contracted; and, third, deducting therefrom the moneys paid into the treasury of the Commonwealth from the Counties included within the said new State during the same period.

The Ordinance did not become a compact between the two States of Virginia and West Virginia, nor did Section 8 of Article VIII. of the Constitution become a compact between the two States at the time of their adoption, for there was then but one State and that was the Commonwealth of Virginia. When she consented and the Congress of the United States admitted West Virginia into the Union, there was an agreement between two States, and for the first time efficacy was given to Section 9 of the ordinance and Section 8 of Article VIII. of the Constitution. Before that they rested entirely in proposition.

When they became effective, they became effective as a compact between two States, one older than the other, but of no

greater dignity or sovereignty; for West Virginia was admitted into the Union, as all States must be admitted, on terms of equality with the original States. It is not conceivable that any State shall be dissimilar or unequal in dignity and sovereignty to the other States. If Section 8 of Article VIII. is to be read in connection with the ordinance, then the compact created the assumption, which was *in futuro*, and left yet to be ascertained, as we have argued, what was the just proportion of the debt which West Virginia agreed to assume or, what is precisely legally equivalent, to take upon herself? It was an unliquidated account. She did not assume the payment of any of the bonds or obligations of Virginia outstanding prior to January 1, 1861. The amount that she was to assume was, if the Ordinance was in effect for any purpose, the amount ascertained by the methods prescribed by the Ordinance. If it is not in effect, then the method is left to the Legislature to choose and to execute.

The word "thereof" in Section 8 of Article VIII. of the Constitution of West Virginia does not bear the construction for which counsel for Virginia contend, nor does the rule of law established in Virginia prior to 1863, that in private contracts "interest follows the principal as the shadow does the substance apply to this case." The decisions which laid down that rule were all with reference to interest between individuals on private obligations.

2. The Virginia Rule as to Private Contracts that Interest Follows the Principal Does Not Apply to Contracts Between States.

But for the dignity and character of the eminent gentlemen who urge it, it is difficult to regard as serious the proposition that because among private parties in Virginia prior to the admission of West Virginia as a State "the interest follows the principal as the shadow does the substance" or, differently stated, because interest is an incident to the debt, or is favored both by the legislative and judicial bodies of the State, and because the laws of the old State, until changed, were adopted in the new as to private parties, that, therefore, by the contract between the sovereign State of Virginia and the sovereign State of West Virginia, a case

for which the law of neither State made provision, West Virginia would be liable to pay all the unpaid interest on her proportion, when ascertained, of the debt existing January 1, 1861. No such intention can be imputed to the framers of the Ordinance, nor to the convention which adopted the Constitution of West Virginia.

The learned counsel appear to be conscious of the inapplicability of the rule which they assert as to interest on private contracts; and to show that it is the rule that the Commonwealth pays interest on claims against her, they cite the case of *Higginbotham's Executrix vs. Commonwealth*, 25 Grattan, 627. That case was decided in 1875, and if it is authority for the statement that in 1875 interest, by the law of Virginia, was allowed against the Commonwealth without any promise to pay interest, but as a mere incident to a debt, it cannot apply in this case. The question would be, what was the law of Virginia in respect of the liability for interest upon claims against her in the absence of contract in 1861, when the ordinance was adopted and when the Constitution of West Virginia was adopted.

3. Analysis of Higginbotham's Executrix vs. Commonwealth.

It is notable that in the *Higginbotham case* the question of interest was not discussed, although many other questions were discussed. The syllabus of the case is as follows:

> "1. The present State of Virginia is bound to the creditors of the state for the debts due before the division for the whole of their debts. And West Virginia is equally bound for them."

That is a decision which hardly binds West Virginia, for she was not a party.

> "2. Under the statute, the State of Virginia may be sued for any debt or claim due, whether liquidated or unliquidated."

The plaintiff in error, and petitioner below, was the executrix of David Higginbotham, deceased, who was the owner of twelve shares of stock in the old James River Company.

By an amendment to the charter of that company, passed on the 17th day of February, 1820, and accepted by the company, the company became the agent of the state to carry on the work for the state, and under the direction and the control of the general assembly; and it was agreed between the state and the company that, in lieu of the annual dividends which might have been thereafter declared on the stock, the company should be allowed twelve per centum per annum on its stock for twelve years from the commencement of the amendatory act, and fifteen per centum per annum thereafter forever. The act was declared on its face to be "a compact" between "this commonwealth and the said company, subject, however, at all times, to such change and modification as the legislature may think proper to make; provided that no such change or modification shall be made as will take from the James River Company their right to the dividends, or any part of the dividends, upon their stock allowed to them by this act." It was a solemn compact between the state and the company that "the dividend or annuity, as it is in effect, should be forever paid without abatement or diminution." Such was the solemn obligation assumed by the State as the price of the stockholders' property.

By an act of February 17, 1820, and other acts, the powers and duties of the James River Company, acting for the State, were from time to time extended and enlarged; but the company up to the last mentioned date, continued to exist under its own organization. On that day, however, a new company, with greatly extended powers, was chartered, called the James River and Kanawha Company, to which all the interest of the State in the old James River Company was transferred; but this transfer was made expressly "subject to the payment of fifteen per centum per annum forever to the *stockholders of the old company.*" By this act the James River and Kanawha Company became the successor of the old James River Company, and the duty of providing forever for the dividend, as it is called, of fifteen per centum per annum to the stockholders of the old company devolved, as we have seen, directly on the James River and Kanawha Company, under its agreement with the State; and by the act of March 22, 1836, the State required the latter company to pay these dividends into the public treasury, to be disbursed among the

stockholders of the old James River Company by the second auditor; thus again solemnly acknowledging the right of the stockholders to these "dividends," and the duty of the State to see that they were punctually paid, by requiring her assignee to pay them into the public treasury to be disbursed to the stockholders by a State officer.

Now, this was treated by the Court as a solemn compact, the obligation of which on the State should be "eternal." The Court says:

> "Accordingly we find that under all the changes of ldgislation on the subject down to the first of January, 1865, the appellant's annuity was regularly paid; but since that date there has been but a single payment of $120, leaving arrearages to the amount of $2,220, as of the first of July, 1871. For that amount *with its accruing interest*, after applying for payment at the offices of the auditor of public accounts, and the second auditor, and being refused at both, this suit was brought."

The petition was dismissed below.

It was claimed by the Attorney-General of Virginia that the dismemberment of the State of Virginia and the formation of a new State, called West Virginia, out of a portion of her territory, had discharged the State of Virginia from this debt as now claimed; that the old debt of Virginia contracted prior to her dismemberment, if not wholly extinguished by the events leading to, attending and following her dismemberment, was not then due from her, but only ratably from the two States. The Court say:

> "Were this a question between the two states alone, I should not question the concluding part of the proposition;"

and quote from Puffendorf:

> "When a kingdom divides by common consent into two or more distinct commonwealths, the public patrimony, with all the debts and encumbrances upon them, ought to be equally shared among them."

The Court decided that, in its opinion, Virginia was liable to pay the petitioner the amount of her demand, with interest, but the Court said, in so deciding :

> " No power is claimed for this court to control or in manner to interfere with the discretion of the legislature in making provision for the payment of this debt. * * * The judgment being for more than three hundred dollars, the court has no authority to require the auditor of public accounts to issue his warrant for the amount. In such cases, the provision to be made for the judgment is expressly reserved to legislative discretion, and to that discretion we must leave it."

It must be noted, in respect of this claim, and it is rather exceptional, that when the State took the property, it was agreed between the State and the old James River Company that, in lieu of the annual dividends which might have been thereafter declared, the company should be allowed twelve per centum per annum on the stock for twelve years from the commencement of the amendatory act, and fifteen per centum per annum thereafter forever. That was a liability from the State to the company in exchange for its property. By subsequent arrangement, all the interest of the State in the old James River Company was transferred to the James River and Kanawha Company, subject to the payment of fifteen per centum per annum forever to the *stockholders* of the old company. By this act the James River and Kanawha Company became the successors of the old James River Company, and the duty of providing forever for the dividend, as it is called, of fifteen per centum per annum to the *stockholders* of the old company devolved directly on the James River and Kanawha Company under its agreement with the State.

This created the relation of debtor and creditor between the James River stockholders and the James River and Kanawha Company. When the Commonwealth compelled the Company to pay the dividend monies into her treasury for distribution by her among the stockholders, she made herself a trustee of the latter, had no right to withhold or use the trust fund, and having failed to pay it over was bound in equity for interest upon it, just as the Company would have

been liable for interest, if the Commonwealth had not interfered and the Company had failed to pay the dividend.

This case cited by counsel is a long way from establishing the proposition, that even in 1875, thirteen years after the transactions involved here, it was the rule in Virginia for the State to allow interest upon claims against her.

When a State takes upon herself a trust she should stand like any other trustee, and the principle that a trustee can take no profit out of the trust estate applies universally.

4. The Case of United States vs. North Carolina.

The learned counsel refer to the case of the *United States vs. North Carolina*, 136 U. S., 211. This was an action of debt brought in this Court, November 5, 1889, by the United States against North Carolina upon 147 bonds, duly executed, for $1,000 each, payable in thirty years from date, with interest at the yearly rate of six per cent., alleged in the declaration to be payable half yearly until payment of the principal. They were executed at different dates, set forth in the statement of the case. They were interest bearing debts. The declaration alleged that, at the dates when the bonds became payable, payment of the principal was demanded by the United States and refused by the State of North Carolina. The defendant pleaded payment of the principal sums of the bonds after they became payable, together with all interest accrued thereon to the days when they became payable. The Court say :

> " The only question presented for our decision is whether, as a matter of law, the principal of the bonds bore interest after maturity."

And they add :

> " Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled ; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested

> by an act of its legislature, or by a lawful contract of its executive officers " ;

citing :

> *United States vs. Sherman*, 98 U. S., 565.
> *Angarica vs. Bayard*, 127 U. S., 251, 260.

The Court looked into the laws of North Carolina, and after stating the law as to the payment of interest in an action, against a private person and citing authorities, said :

> " But it is equally well settled, by judgments of the Supreme Court of North Carolina, that the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid."

5. THERE IS NO BASIS FOR VIRGINIA'S CLAIM FOR INTEREST.

No statute of Virginia has been cited by the learned counsel, who would have cited it, we think, if there had been such, by which the State subjects itself to the payment of interest as an incident to a debt, or by way of compensation for its use, or damages for non-payment of the principal when due. Whether the legislature in the *Higginbotham case* appropriated the interest, the counsel do not state. The opinion of the Supreme Court of the State that it ought to do so does not make it the rule of the State, nor do legislative acts in special and sporadic cases which allow interest on claims constitute a rule which binds the State to pay interest upon claims against it.

Moreover, Virginia is the State *demanding interest.* If one sovereign makes it a rule to pay interest on claims against it without having contracted so to do, in other words, puts itself upon the same plane as private creditors may be placed by its laws, does it follow that, because it pays interest itself without having agreed to do it, that it may collect interest from another sovereign which does not pay interest except where it has contracted to do so? The United States does not pay interest except where it contracts to pay it.

We have found no indication in the decisions of the Supreme Court of Virginia that any such rule has been adopted

by the legislature of that State, or by the Courts of that State, if indeed the Courts can make such a rule for a State. It is a matter of contract, and contracts are not made by the Courts for States or their citizens.

Virginia has given very liberal right to her citizens to sue; but it is a suit for liquidation. The Court has no power, except in petty claims, amounting to not over $300, to direct the auditor to issue a warrant, and the whole matter of payment, including the principal sum awarded, with or without interest, is left entirely to the discretion of the Legislature. Probably, sometimes, they pay interest, and oftener they do not, as the case may or may not appeal to the legislative judgment. But there is no statutory rule for the payment of interest by the State on claims against her where she has not contracted to pay it.

In 1837, the question arose in the Court of Appeals of Virginia in the case of *Commonwealth vs. Marston's, Administrator*, 9 Leigh, page 36. To that case, there is appended a note, as follows:

> "There was an error committed by the reporter, in the report of *Lilly's* case, 1 Leigh, 525, 6. It is there stated, that the circuit court of *Henrico* reversed the auditor's decision, and ordered him to issue a warrant in favor of *Lilly's* administrator, *for the amount of five years full pay, with interest from the 22d April, 1873;* and that that judgment was affirmed. But, in fact, the circuit court gave judgment, *not* for the *commutation*, but for the *half pay* that accrued to *Lilly* during his life, without interest; and that was the judgment which this court affirmed. This court expressly decided, that no *interest* should be paid; see judge *Green's* opinion, in the same case, *Id.*, 538, and in *Markham's* case, *Id.*, 523, 4."

6. West Virginia Agreed to Assume a Just Proportion, Not of the Outstanding Obligations of Virginia, but of Her Debt.

It is clear that the Constitution can bear no such construction as is sought to be placed upon it. It must be borne in

mind that neither by the Ordinance nor by the Constitution was there any agreement to assume, or an assumption of, any proportion of the obligations of the Commonwealth of Virginia outstanding prior to 1862. If she had agreed to assume a just proportion of the obligations of the Commonwealth, it might be argued that, as they were interest-bearing obligations, she assumed to pay the principal and accruing interest, until paid; but the bonds or State stock, as evidences of debt, are one thing. The debt is another, and different thing. Moreover, it seems impossible to impute an intention, upon the part of the framers of the two instruments, that the new State should assume a proportion of the outstanding interest-bearing securities of the old State, January 1, 1861. For that day, it was an enormous debt. The framers of those instruments were well aware, as were the people in the Trans-Alleghany territory, that the moneys borrowed by the State had been expended in payment of stock subscriptions in corporations created to construct various internal improvements. Is it conceivable that it could have been intended by the convention which framed either the ordinance or the Constitution that the new State should assume, considering the character of the debt, the purposes for which it was contracted, the territory within which it had been expended, from 1823 to 1861, a proportion of the obligations representing the debt, and especially in view of the fact that the people of what now constitutes West Virginia had been, during a large portion of the period, deeply resentful that they were taxed to pay interest upon such indebtedness, so little of the proceeds of which was expended within their territory, and enured to their benefit?

7. THERE IS NO EVIDENCE THAT THE IMPROVEMENTS CONSTRUCTED BY VIRGINIA WITHIN HER PRESENT LIMITS WERE FOR THE BENEFIT OF THE REGION NOW WEST VIRGINIA.

It is alleged in the Bill that these expenditures were largely with a view to the ultimate benefit of West Virginia, and to secure the development of her resources and the prosperity of her people. This is alleged in general terms. If this allegation is susceptible of proof, no proof has been

offered. If, by the participation of her government and people in the War she was, and as a consequence of the impoverishment and destruction wrought by war within her limits, unable to continue to completion such works as would, if completed, have benefited West Virginia and her people, it is safe to say that the people of that portion of the State did not contribute to that result (*Davis vs. Gray*, 16 Wallace, 203).

The answer denies that the purpose of the improvements or the effect of the improvements, in the main constructed within the present limits of Virginia, were with reference to the well-being, or would, if completed, have essentially affected the well-being of what is now West Virginia and her people. Answer under oath is not waived by the Bill, and the answer is verified by the oath of the Governor of West Virginia. No evidence has been offered upon the subject.

8. Facts Showing Injustice of Virginia's Claims.

The injustice of charging to West Virginia a proportion of the internal improvement debt of Virginia, prior to January 1, 1861, *as such*, is further intensified by the facts in relation to the population of the other during the years from 1823 to 1861. While the territory was separated, as we have said, from Eastern Virginia, and what is known as "The Valley" by the Alleghany Mountains, and while the markets of its people were to the westward, rather than to the eastward, it was no sparsely settled region.

There was laid before the Constitutional Convention of 1829-30 by Mr. Doddridge, one of its ablest members, who represented West Virginia, a statement showing the distribution of the white population in 1810, 1820 and 1829, as follows:

"In 1810 the white population was distributed thus, viz.:

East of the Blue Ridge		338,837
In the Valley	108,355	
West of the Alleghany	104,377	212,726
Whole population		551,553

"In 1820 population was distributed thus. viz.:

East of the Blue Ridge		348,875
In the Valley	121,196	
West of the Alleghany	133,112	254,308
Whole population		603,081

"And in 1829 the white population, as estimated by the Auditor, stood thus:

East of the Blue Ridge		362,745
In the Valley	138,134	
West of the Alleghany	181,384	319.516
Whole population		682,261"

It will be noticed that from 1810 to 1820 the population east of the Blue Ridge increased 10,038. The Valley increased 12,841. The increase west of the Alleghany was 28,735. From 1820 to 1829 the increase in the white population east of the Blue Ridge was 13,870. The increase in the Valley was 16,938. The increase in the Trans-Alleghany territory was 48,272.

(These figures are from the Book entitled "Proceedings and Debates of the Virginia State Convention of 1829-30," page 686. There are some errors in addition; but they are, relatively, trifling. The book was printed after the Convention had been dissolved, and, undoubtedly, the figures used by Mr. Doddridge, were correct.)

It will be observed that the increase in population in the territory "East of the Blue Ridge" combined with the increase in population "In the Valley" was 30,808, a total increase for the two regions of 17,464 less than the total increase in population in the territory "West of the Alleghany."

Mr. Doddridge said (page 682):

> "It thus appears that in 19 years, white population East of the Blue Ridge, beginning with 338,837, has increased to 362,745, or to the amount of 29,908. The increase in the Valley having in 1810, 108,345 has been 29,779. Making in 1829, 138,134. These data show

that the increase in the Valley and in the whole East are nearly equal. That in the Valley being the smallest only by a difference of 129. As the Valley has kept pace with the whole East for nineteen years past, so it probably will hereafter, and therefore, a permanent apportionment which would do justice to the present Valley and Eastern population with reference to each other, might probably suit them in all future time: yet, the same apportionment might operate to the utmost excess of cruelty and injustice to the Trans-Alleghany country. To concur in such a one would be a treachery to the Valley, of which we have not the least apprehension. The extent of this injustice will be manifested by comparing the increase of that population during the same period of 19 years. In 1810 we commenced with a population of 104,377, which, in 1829, is 181,384, having increased 77,007, or four times as much as either the Valley or all the country East of the Blue Ridge mountains."

The territory of West Virginia was, by location, climate, proximity to Pennsylvania, Ohio and Kentucky, and in the sentiment of her people upon the question of slavery and the trifling number of slaves within her territory, inviting an immigration, which never sought, in even measurably the same numbers, the real slave states of the Union. Notwithstanding this population, constantly increasing, of the $33,000,000 expended out of borrowed money, less than one-tenth was expended within what now are the limits of West Virginia; and it may very well be said that it was largely due to the fact of disproportionate representation.

It is truthfully said in "Part II." of this brief, page 173:

> "It should be remembered that there was not in the entire territory of Virginia, which is now West Virginia, on the 1st day of January, 1861, a single mile of state-built or state-aided railroad, nor a mile of canal, nor a state building; not even a school, not a public institution of any kind."

9. Under the Ordinance and Her Constitution West Virginia Cannot be Charged with Interest Until After the Ascertainment in the Manner Prescribed of her Equitable Proportion of the Old Virginia Debt.

The Ordinance prescribes a method of accounting by which a definite sum shall be ascertained. This sum the Ordinance, in effect, declares to be West Virginia's just proportion of the old Virginia debt. Section 8 of Article VIII. of West Virginia's Constitution, when read in connection with the Ordinance, as this Court has said it should be, produces precisely the same result. West Virginia did not agree to pay interest on the sum to be ascertained by the prescribed method before this sum was ascertained.

We refer again to Section 8 of Article VIII. of the Constitution of West Virginia.

> "An equitable proportion of the public debt of the commonwealth of Virginia, prior to the 1st of January, 1861, shall be assumed by this State, and the legislature shall *ascertain the same* as soon as may be practicable and provide for the liquidation *thereof* by a sinking fund sufficient to pay the *accruing* interest and redeem the *principal* within thirty-four years."

That the word "thereof" refers to the result of an accounting in accordance with the terms of the Ordinance, or, if the latter be eliminated, in accordance with such method as the Legislature shall adopt, is not susceptible of doubt. That the command to the legislature to "provide for the liquidation thereof," means the sum which the legislature shall ascertain by pursuit of the methods prescribed by the Ordinance, or if that be eliminated, by such method as the Legislature shall adopt, is equally clear. The words "accruing interest" obviously refer to the word "principal."

We maintain most earnestly that, all things considered, it is clear that it was the manifest purpose that West Virginia was not to assume any portion of the public debt of Virginia as such, but was only to contribute to that end such sum, be it much or little, as would result from the accounting prescribed by the Ordinance, unless the general words in the first clause

of Section 9 of the Ordinance control and destroy the special provisions which follow, all being expressed in a single sentence. Moreover, this produces an equitable result, for the debt being an internal improvement debt, and nine-tenths of it having been expended by Virginia within her present limits, in public improvements, it would have been, in the highest degree, inequitable for the new State to take upon herself an obligation to contribute one-third of that debt, when Virginia retained the bank and other stocks.

"Accruing" is a word operative in the future, and has no reference to the past. When we speak of past due interest we refer to it as "accrued interest".

Six months' interest, the record shows, was due and defaulted on this debt on January 1, 1861. Where is there any indication here, upon the part of West Virginia, of an intention to pay accrued interest? The interest up to the time of the ascertainment would be "accrued." She did not in her Constitution assume:

> "a just proportion of the debt, with interest to accrue thereon, to the date of the ascertainment, until the just proportion shall have been ascertained and paid."

The Constitution speaks of "accruing interest" and that means the interest to accrue on the principal thereafter to be ascertained, and not yet ascertained. This is not technical. It is substantial. It is in harmony with the ordinary use of the word "accrue" and with its technical, legal signification.

At an earlier hearing in this case, we called the attention of the court to the case of *Gross vs. Partenheimer*, 159 Pa., 556. The case may be briefly stated:

Plaintiff agreed to purchase from defendant, in April, 1883, a lot of land, for $8,000, payable $5,000 in cash, on delivery of deed, and the residue by plaintiff's assumption of a mortgage for $3,000, then on the lot, plaintiff to pay also the accruing interest on said mortgage, not exceeding six months. The six months' interest from the date of mortgage to February 26, 1893, was past due and unpaid, and, to avoid foreclosure proceedings, plaintiff was compelled to pay the same: He then brought suit to recover the sum thus paid, the vendor claiming that the purchaser was obliged to pay it under the agreement.

The court, at page 558, said:

> "This contention hinges entirely on the proper construction of the clause in the contract of sale above referred to, wherein the plaintiff agrees to pay 'the accruing interest in said mortgage not exceeding six months.' There is nothing in the affidavit of defense that can in any wise aid or control the construction of this clause. If, 'accruing interest' means interest which, according to the terms of the security, was due and payable on February 26, 1893, and remained overdue and unpaid at the date of the contract, the defendant's construction should prevail; but we cannot agree that these words mean any such thing. Such a construction would be strained and wholly unwarranted by the language employed. As generally understood, 'accruing' interest means running or accumulating interest, as distinguished from accrued or matured interest. When we speak of interest which is from day to day accumulating on the principal debt, but which is not yet due and payable, we call it accruing interest. When we refer to interest heretofore payable but still remaining unpaid, we speak of it as overdue interest, arrears of interest, or interest in arrear, just as we speak of rent in arrear. We are therefore of opinion that the words 'accruing interest' do not refer to, or in any manner embrace any part of the six months' interest which was then overdue and unpaid. That interest was an encumbrance on the lot, which the defendant was bound to remove. He refused to do so, and the plaintiff, who was compelled to pay it, in order to prevent foreclosure of the mortgage, etc., is entitled to recover the amount thus paid with interest from date of payment. The learned court was clearly right in adjudging the affidavit of defence insufficient and entering judgment against defendant for the amount claimed by plaintiff."

If there had been any intent to assume, or pay, the accrued interest on the bonds of Virginia, outstanding, the Constitution would have so expressed it; and, as expressed,

we earnestly contend that it can be construed to mean no such thing.

For the convenience of the court, we venture to insert the memorandum of authorities submitted by the late John G. Carlisle, who died during the last Summer, upon this question of the liability of the State to pay interest.

10. Memorandum of John G. Carlisle.

"It will be observed that in paragraph II. of this draft of a decree the master is not only directed to ascertain the amount and proportion of said indebtedness, but 'of the interest accrued thereon.'

"Counsel for the defendant object further to this paragraph because there is no legal ground for directing the ascertainment of interest. The State of West Virginia has not obligated herself in any manner for the payment of interest. The principle is well settled that a State is not liable to pay interest unless it has expressly contracted to do so.

"In support of this proposition this Court, in *United States v. North Carolina*, 136 U. S., 211, said:

> "'A State is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by lawful contract of its executive officers.'

"Following the principle thus announced by this Court, many of the State courts have laid down in distinct terms the same proposition. Among the decisions of these courts are the following:

Sawyer v. Colgan, 102 Cal., 293; 36 Pac., 583.
Hawkins v. Mitchell, 34 Fla., 421, 422; 16 So., 316.
Molineaux v. State, 109 Cla., 380; Am. St. Rep., 50; 42 Pac., 34.
Flint, etc., R. R. v. Board of State Auditors, 102 Mich., 502; 60 N. W., 971.
Carr v. State, 127 Ind., 204; 22 Am. St. Rep., 624.

"In *Carr v. State*, 127 Ind., 204, 22 Am. St. Rep., 624, this principle is announced as one of the points decided:

> "'A sovereign State is not bound to pay interest unless it has contracted to do so.'"

" The court, in the course of its opinion in this case, says :

" ' In the case of *State ex rel. vs. Board*, etc., 36 Ohio St., 409, it was held that in the absence of a promise to pay interest none can be recovered against a State, and that a State is not within the provisions of a general statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor. The court put its decision upon the familiar rule that a sovereign is not bound by the words of a statute unless it is expressly named, and in support of its conclusion cited these cases : *Trustee, etc. v. Campbell*, 16 Ohio St., 11 ; *Joselyn v. Stone*, 28 Miss., 753 ; *State v. Kinne*, 41 N. J., 238 : *Attorney General v. Cape Fear*, etc,, Co., 2 Ired. Eq., 444 ; *Auditorial Board vs. Arles*, 15 Tex., 72 ; *State v. Thompson*, 10 Ark., 61. In *Wightman v. United States*, 23 Ct. of Cl., 144, the general rule was stated, and it was said : ' Hence there is no law fixing a rate for interest for all classes of the public debt, and a long-established public policy has been to pay interest only where it is a subject of express agreement or of positive enactment.' It was held in the case of Tilson v. United States, 100 U. S., 43, that a statute referring to a claim did not authorize a recovery of interest, in the absence of words expressly providing for the payment of interest. It is impossible to escape the effect of these authorities, and considerations may be readily suggested which increase their force. One is, there is no right to coerce the payment of a debt due from a sovereign, and, of course, a sovereign may impose limitations upon its liability.

" In a note appended to this case as reported in 22 American State Reports, at page 448, we find the following :

' With respect to the obligation of the State to pay interest upon its indebtedness, the principal case is well established by other authorities upon the same subject. In nearly and perhaps all of the

States there are statutory provisions providing that moneys, after they become due, shall, in the absence of express contract to the contrary, bear the rate of interest specified in such statutes; but, acting under the old common-law rule that the king or sovereign is not bound by statute unless expressly named therein, it has been uniformly held that these statutory provisions respecting interest did not apply to any obligation either of the State or of the national government, and therefore that interest is never allowed upon such obligations, in the absence of some special statute clearly manifesting the intention of the sovereign to be bound for the payment of interest upon the particular obligation or class of obligations under consideration (*United States v. North Carolina*, 136 U. S., 211; *State v. Thompson*, 10 Ark., 61; *State v. Board of Public Works*, 36 Ohio St., 409; *State v. Bank of Washington*, 18 Ark., 554; *United States v. Sherman*, 98 U. S., 565; *United States v. Bayard*, 127 U. S., 251; *Tillson v. United States*, 100 U. S., 43; *In re Gosman*, 17 Ch. Div., 771; *Attorney General v. Cape Fear N. Co.*, 2 Ired. Eq., 444; *Bledsoe v. State*, 64 N. C., 392; *Trustee v. Campbell*, 16 Ohio St., 11; *Joselyn v. Stone*, 28 Miss., 753; *Wightman v. United States*, 23 Ct. of Cls., 144).' "

11. Virginia's Responsibility for the Delay in Apportioning the Debt.

Reading Section 8 of Article VIII. of the Constitution of West Virginia with the Ordinance, or regardless of it, the complainant, by her own acts, rendered impossible, any ascertainment prior to January 1, 1871, of the just proportion of the public debt of Virginia to be borne by West Virginia. In 1866, she instituted in this Court, the suit of *Virginia vs. West Virginia*, 11 Wallace, 39. This was an original bill to settle the boundary line between the States of Virginia and West Virginia. It involved the question whether the Counties of Berkeley and Jefferson were a part of West Virginia. The

case was not decided until December, 1870. While Virginia cannot be complained of for instituting and prosecuting the suit, it is manifest that, until the determination thereof, there could be no apportionment of the old Virginia debt, either under the Ordinance or under Section 8 of Article VIII. of the Constitution of West Virginia.

Pending the decision of the case, the accounting provided for by the Ordinance would be impossible, in view of its requirements :

> *(a)* " *Charging to it all State expenditures within the limits thereof.*"

Manifestly, so long as those limits were unsettled, this could not be done.

> *(b)* " *A just proportion of the ordinary expenses of the State Government since any part of said debt was contracted.*"

This could not be fulfilled upon the basis of taxable values, area or population until the boundaries of the State were settled.

> *(c) Deducting therefrom the moneys paid into the treasury of the Commonwealth from the Counties included within the said new State during the same period.*

This could not be done until the territorial limits of the new State were settled, and it was known what Counties were included within the new State. So that, while entirely within her right, Virginia's own act compelled a delay from the filing of this bill until the entry of the final decree therein of an adjustment under the Ordinance or under the Constitution.

Section 9 of Article X. of the Constitution of Virginia, which became operative in 1870, contained the following provisions :

> "The General Assembly shall provide by law for adjusting with the State of Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia, and shall provide

> that such sum as shall be received from West Virginia, shall be applied to the payment of the public debt of the State."

We do not deem it necessary here to give a history of the appointment of Commissions by the two States with reference to the adjustment of the debt. This history is set out in the pleadings. It is enough to say that as early as 1870, a Commission appointed by West Virginia proceeded to Richmond, where the archives all were, and their visit resulted in accomplishing little. But, on March 30, 1871, the Legislature of Virginia, by a law passed in 1871, apportioned the debt between the two States, assuming for itself two-thirds, and issuing certificates for the other one-third as West Virginia's share. Subsequent legislation of Virginia proceeded upon that apportionment, certificates being issued, to be accounted for by West Virginia.

It is difficult to conceive of any theory upon which Virginia could justly assume the function of apportioning the debt and issuing obligations for which West Virginia could be accountable. Virginia's General Assembly were, by the constitutional provision above quoted required to provide by law for adjusting with the State of West Virginia the proportion of the public debt to be borne by the two States. They proceeded to apportion it themselves, without consulting West Virginia.

West Virginia then was a comparatively new State, and her resources were relatively undeveloped.

To issue securities to be accounted for by West Virginia, was not only apparently in defiance of Virginia's own constitutional provision, but was usurpatory, detrimental to the credit of West Virginia, and well calculated to produce resentment among her people.

From that time, West Virginia was placed in a position which rendered it almost impossible for her, with dignity and self respect, to take further initiative in the matter.

In 1894, the Legislature of Virginia, after she had funded and refunded her debt, adopted a joint resolution, providing for the appointment of a

> " commission of seven members, who were authorized and directed to negotiate with the State of West Vir-

ginia for a settlement and adjustment of the latter State's part of the public debt proper to be borne by her."

It was provided :

> " But said Commission shall, in no event, enter into any negotiation hereunder, except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State which she has already provided for as her equitable proportion thereof."

It is quite manifest that West Virginia was here called upon, as a condition of any negotiation whatever, to accept the action of Virginia taken in 1871, 1879 and 1894 apportioning the debt, two-thirds to herself and one-third to West Virginia. It needs no argument to show that West Virginia could not be expected to negotiate upon such a basis. It was not until 1905, preliminary to the institution of this suit, that a Commission went to West Virginia freed from such restraint.

STATE OF WEST VIRGINIA,
By
WILLIAM G. CONLEY,
Attorney-General.

JOHN C. SPOONER,
CHARLES E. HOGG,
W. MOLLOHAN,
GEORGE W. MCCLINTIC,
WM. M O. DAWSON,
W. G. MATTHEWS,
Counsel.

Appendix.

COMMONWEALTH OF VIRGINIA.

Investments in Capital Stock.

Investments in Companies Lying Wholly Within the Territory Now Constituting the Commonwealth of Virginia:—		
Banks	$ 2,108,591.00	
Turnpike and Road Companies	1,897,747.22	
Bridge Companies	49,622.16	
Navigation Companies	908,173.17	
Railroad Companies	13,713,256.55	
Alexandria Canal Company	272,000.00	
Total Investment in Virginia Companies		$18,949,390.10
Percentage of Total Investment	62.9120	
Investments in Companies Lying Wholly Within the Territory Now Constituting the State of West Virginia:—		
Banks	$ 391,800.00	
Turnpike and Road Companies	700,103.49	
Bridge Companies	78,412.50	
Navigation Companies	210,500.00	
Total Investment in West Virginia Companies		$1,380,815.99

Brought forward		$20,330,206.09
Percentage of Total Investment..4.5844		
Investments in Inter-State Companies:--		
Turnpike and Road Companies	$ 175,108.58	
James River and Kanawha Company (3.49% located in West Virginia)	9,245,140.46	
Winchester and Potomac Railroad Company	120,000.00	
Total Investments in Inter-State Companies		9,540,249.04
Percentage of Total Investment..31.6736		
Chesapeake and Ohio Canal Company; Maryland Division		250,000.00
Percentage of Total Investment..0.8300		
Total Investments in Capital Stock		$30,120,455.13

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

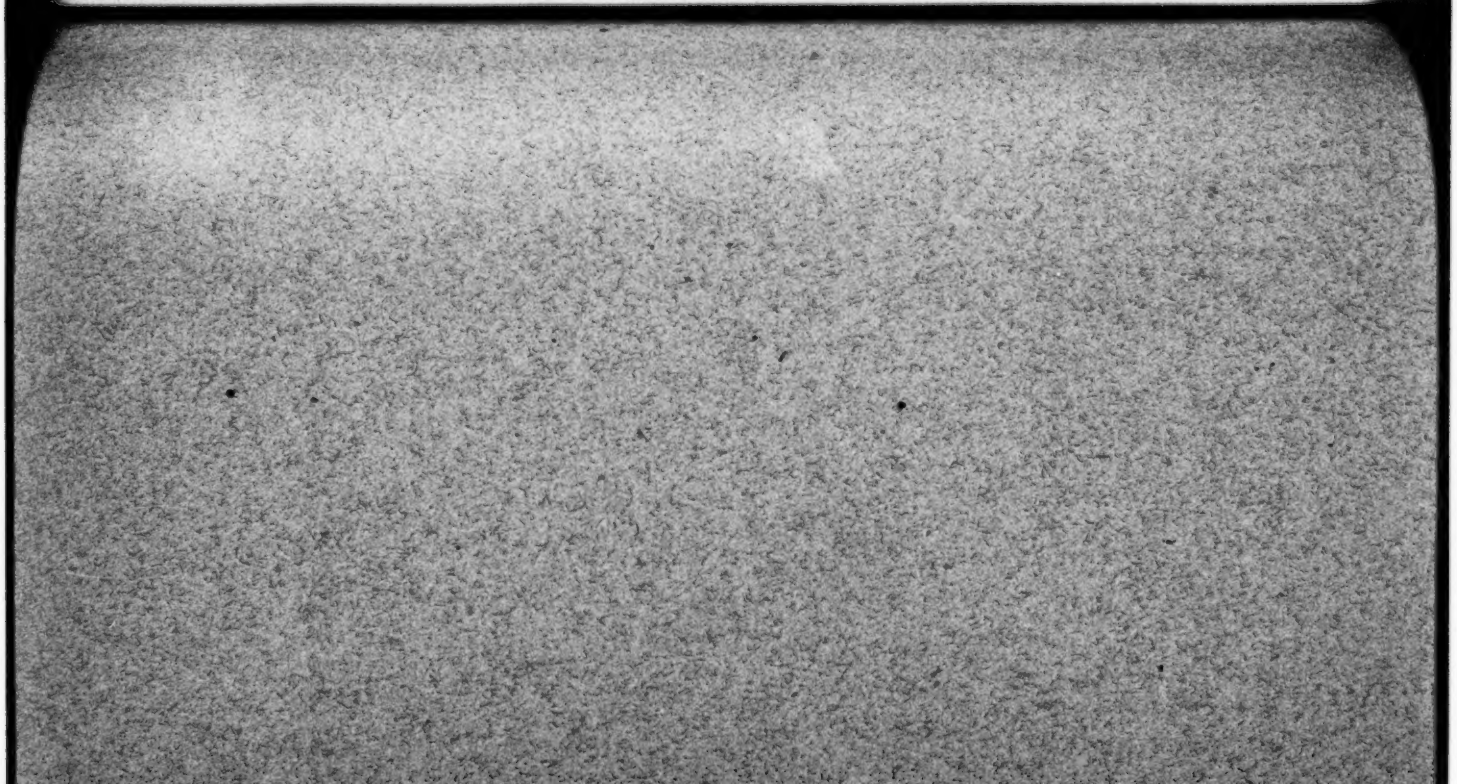
ORIGINAL No. 2

COMMONWEALTH OF VIRGINIA, Plaintiff,

vs.) In Equity.

STATE OF WEST VIRGINIA, Defendadt.

Statement prepared by Mr. Thomas Bird Dixcy, Accountant for West Virginia, at the request of Mr. Justice Hughes on the hearing of the above case.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

ORIGINAL No. 3.

COMMONWEALTH OF VIRGINIA, Plaintiff,

vs.) In Equity.

STATE OF WEST VIRGINIA, Defendadt.

Statement prepared by Mr. Thomas Bird Dixey, Accountant for West Virginia, at the request of Mr. Justice Hughes on the hearing of the above case.

STATEMENT NO. ONE.

All State Expenditures Within the Territory now Constituting the Commonwealth of Virginia From March 19, 1823, to January 1, 1861.

Covington and Ohio Railroad:—		
Total Expenditure, (Record, p. 373; item 2.)	$2,787,128.33	
Charged by Master to West Virginia, (Report, p. 83.),	1,146,460 42	
Balance chargeable to Virginia,		$1,640,667.91

Appropriations to Turnpikes and Roads, wholly within the territory now constituting the Commonwealth of Virginia, (Record, bottom p. 1059.)		791,888.04
Construction of the Blue Ridge Railroad, (Record, top p. 1060.)		1,604,824.73
Bridge at Covington, (Record, p. 1060; item 2.)		6,007.07
Virginia's proportion, based on actual cost and mileage, of appropriations to to turnpikes and roads extending into and between the two states as at present constituted, (Record, p. 1060; item 3.)		247,289.33
Birthplace of Washington; Land, (Record, p. 1061; item 4.),†		139.21
Portrait of Chief Justice Marshall, (Record, p. 1061; item 8.)		500.00
Gun Houses in Virginia, (Record, p. 1061; item 10.)		1,000.00
Cannon House; 71st. Regiment, (Record, p. 1061; item 12.)		110.00
Institute for the Deaf, Dumb and Blind, (Record, p. 1061; item 17.)		100,661.94
Eastern Lunatic Asylum; Williamsburgh:—		
Buildings, (Record, p. 1061; item 20.)		68,264.19
Gas installation, (Record, p. 1061; item 21.)		6,000.00
Enclosure walls, etc., (Record, p. 1061; item 22.)		13,161.00
Additional charges on buildings, etc., (Same; item 23.)	$38,589.00	
Less amount charged by Master to Ordinary Expenses, (Report, p. 135; item 19.)	5,000.00	33,589.00
Furniture, buildings, land, etc., (Record, p. 1061; item 24.)		7,266.00
Gun House at Alexandria, (Record, p. 1062; item 3)		900.00
Gun House at Richmond, (Record, p. 1062; item 4.)		1,079.09
Jefferson Statue, (Record, p. 1062; item 16)		9,950.00
Lot on Governor Street, (Record, p. 1062; item 21)		963.92
Museum property, (Record, p. 1062; item 22)		6,958.50
Medical College of Virginia, at Richmond, (Record, p. 1062; item 24)		25,000.00
Monroe Monument and burial, (Record, p. 1063; item 1)		3,887.54
Margaret Academy, Accomac County, (Record, p. 1063; item 2)		1,500.00
Penitentiary:		
Erecting Hospital, (Record, p. 1063; item 7)		9,346.98
Lot, (Record, p. 1063; item 8)		3,000.00
Pipe for water supply, (Record, p. 1063; item 9)		1,600.50
State Courthouse, (Record, p. 1064; item 2)		22,387.54
Capitol Square, Governor's Mansion, etc., (Record, p. 1064; item 3)		12,278.47
University of Virginia, (Record, p. 1064; item 8)		25,000.00
Virginia Military Institute:		
Buildings, (Record, p. 1064; item 9)		151,000.00
Statue of Washington, (Record, p. 1064; item 10)		10,000.00
Washington College, (Record, p. 1064; item 11)		8,114.64
Warehouses purchased, (Record, p. 1064; item 12)		37,550.15
Washington Monument, at Richmond, (Record, p. 1064; item 13)		169,706.81
Western Lunatic Asylum, Staunton:		
Buildings, (Record, p. 1064; item 18)		160,642.37
Water, gas and heating plant, (Record, p. 1064; item 19)		40,685.00
Land, enclosure walls, etc., (Record, p. 1064; item 20)		25,988.01
Support, land, etc., (Record, p. 1064; item 21)	$10,700.00	

Less support charged by Master to Ordinary Expenses, (Report p. 135; item 19)		7,450.01	3,249.99
Surveys:			
Total, (Record, p. 374; item 55 & p. 1063; item 16)		$250,206.56	
Less charged by the Master to:			
West Virginia, (Report, p. 83; item 55)	$ 60,873.19		
Ordinary expenses, (Report, p. 135; item 27).	106,983.67	167,856.86	
Balance, chargeable to Virginia			82,349.70
Total			$ 5,334,527.63

STATEMENT NO. TWO.

Investments, by the Commonwealth of Virginia, in the Capital Stock of Companies incorporated for enterprises of public improvement and convenience, from March 19, 1823, to January 1, 1861.

	Total subscribed by the State	Cost of property located in Virginia	West Virginia
Investments in the Capital Stock of Companies whose property lay wholly within the territory now constituting the Commonwealth of Virginia:			
Banks, (Record, p. 1059)		$ 2,108,591.00	
Turnpike and Road Companies, (Record, p. 1059)		1,897,747.22	
Bridge Companies, (Record p. 1059)		49,622.16	
Navigation Companies, (Rec. p. 1059)		908,173.17	
Railroad Companies (Rec. p. 1059)		13,713,256.55	
Alexandria Canal Company, (Record, p. 1060)		272,000.00	
Total Investment in Virginia Companies.	$18,949,390.10		
Investments in the Capital Stock of Companies whose property lay wholly within the territory now constituting the State of West Virginia:			
Banks:			
Northwestern Bank of Virginia, (Record, p. 820 A)			$ 341,800.00
Fairmont Bank, (Record, p. 820A)			50,000.00
Turnpike and Road Companies, (Record, p. 820 A)			700,103.49
Bridge Companies, Rec. p. 820 A)			78,412.50
Navigation Companies, .Record, p. 820 A)			210,500.00
Total Investment in West Virginia Companies	1,380,815.99		
Investments in the Capital Stock of Companies whose property extended into and between the			

territory now constituting the two States:			
Record,(p. 375; items 70 to 80, inclusive):			
Berkeley & Hampshire Turnpike Co.....	$6,572.00	1,249.53	15,322.47
Cross Roads & Summit Pt. Turnpike Company.....	6.000,00	3,217.20	2,728,80
Giles, Fayette & Kanawha Turnpike Company.....	44,991.60	1,070.80	43,920.80
Huntersville & Warm Springs Turnpike Company.....	6,159.24	4,843.63	1,315.61
Hardy & Winchester Turnpike Company....	23,400.00	7,672.86	15,727.14
Hillsborough & Harper's Ferry Turnpike Company.....	6,000.00	5,857.20	142.80
Martinburgs & Winchester Turnpike Company.....	27,000.00	11,045.70	15,954.30
Morgan & Frederick Turnpike Co.....	8,005.00	2,134.67	5,870.33
Mountain Lake & Salt Sulphur Springs Turnpike Company.....	4,800.00	4,000.00	800.00
North Frederick Turnpike Company.....	11,325.00	10,002.24	1,322.76
Raleigh & Wythe Line Turnpike Co.....	400.00	106.67	293.33
Berryville & Charlestown Turnpike Company (Record, pp. 373 & 1061. Master's Report, p. 64; item 6).....	20,455.74	8,523.22	11,932.52
James River & Kanawha Company: Record, pp. 820 A and 820 M $9,547,582.21 Less amount charged by Master as an expenditure within the territory of West Virginia..... 302,441.75 (Report, p. 83; items 10 to 14, inclusive).	9,245,140.46	8,922,489.06	322,651.40
Whincester & Potomac Railroad Co., (Record, pp. 373 & 1060).....	120,000.00	44,208.00	75,792.00
Chesapeake & Ohio Canal Company; Maryland Division, (Record, p. 1061).....	250.000.00	250,000.00	
Total.....	$30,120,455.13	$28,225,810.88	$1,894,644.25

STATEMENT NO. THREE.

Loans by the Commonwealth of Virginia to Companies incorporated for enterprises of public improvement, from March 19, 1823, to January 1, 1861.

	Total loaned by the State	Cost of property in Virginia	West Virginia
Loans to Railroad Companies whose Railroads lay wholly within the territory now constituting the commonwealth of Virginia; unpaid January 1, 1861. (Record, p. 1060).....	$2,930.000.00	$2,930,000.00	
Loan to Winchester & Potomac Railroad; (Record,			

pp. 489 & 1060. Master's Report, p. 63). 63. 16% in West Virginia	150,000.00	55,260.00	$94,740.00
Loan to James River & Kanawha Company; (Record, pp. 490 & 1063. Master's Report, p. 710. 3.49% in West Virginia	60,000.00	57,906.00	2,094.00
Total	$3,140,000.00	$3,043,166.00	$96,834.00

It will be observed that statement No. 1 applies alone to moneys expended by Virginia within the territory of Virginia on properties wholly owned and continuing the property of the State of Virginia after the division.

It will be observed from statement No. 2. that it consists wholly of the investment in stocks where the property of the companies was located either in what is now Virginia or what is now West Virginia. This statement, in the portion applying to West Virginia includes bank stock $391,800.00, James River and Kanawha Company stock $322,651.40 and Winchester and Potomac Railroad Company stock $75,792.00, and bonds $94,740.00, which Virginia has admitted was not a state expenditure within the meaning of the first section of the Ordinance and in third paragraph of the decree.

Statement No. 3 shows the loans made to companies and where the property of the company to which the loan was made is situated.

Respectfully submitted,

WILLIAM G. CONLEY,

ATTORNEY GENERAL OF WEST VIRGINIA.

Feb. 10, 1911.